

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846
MICHIGAN, .
 . Detroit, Michigan
 . October 27, 2014
Debtor. . 9:00 a.m.

TRIAL RE. OBJECTIONS TO CHAPTER 9 PLAN
BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE CLERK: All rise. Court is in session. Please
2 be seated. Case Number 13-53846, City of Detroit, Michigan.

3 THE COURT: One moment, please. Sir.

4 MR. BENNETT: Good morning, your Honor. Bruce
5 Bennett for Jones Day on behalf of the city. Before we get
6 started with final argument, there's actually one loose end
7 that has to be tied up, and I think Mr. Perez has one comment
8 to make, and I have to read something into the record.

9 THE COURT: Okay.

10 MR. PEREZ: Good morning, your Honor. Alfredo
11 Perez on behalf of FGIC. Your Honor, I'm happy to report
12 that just in the nick of time we've resolved each and every
13 one of the kind of pending issues, but we did reach agreement
14 on language that -- reservation of rights language that would
15 go into the confirmation order. That's what Mr. Bennett is
16 going to read. And all the parties, including the swap
17 counterparties, FGIC, Syncora, the city, the COP holders,
18 were basically all agreed on that language.

19 Your Honor, as of about ten minutes ago, we filed on
20 the record the form of term sheet, the agreement between the
21 COP holders and FGIC, which was largely done, but just had to
22 be updated to reflect everything.

23 Additionally, your Honor, on Friday we received word
24 from the Department of Financial Services that they had
25 waived the notice period, so we now have the ability to enter

1 into the settlement.

2 THE COURT: Thank you.

3 MR. WAGNER: Your Honor, Jonathan Wagner from Kramer
4 Levin on behalf of holders of a billion dollars of
5 certificates of participation. I owe your Honor answers to
6 two questions. One is our status and, two, the length of my
7 closing. I don't think there's any suspense here, but I'm
8 happy to report that we are withdrawing our objection. The
9 ad hoc COPs holders have reached agreement with FGIC as to
10 how plan distributions will be made and how the policies will
11 be administered, and as Mr. Perez noted, that agreement is
12 now embodied in a term sheet filed with the Court. The city
13 has circulated a form of confirmation order. We haven't been
14 able to give it to our clients yet because it hasn't been
15 publicly filed, but based on the term sheet and the
16 confirmation order as it's been supplied to us, we're
17 prepared to withdraw the objection, obviously reserve all our
18 rights with respect to any confirmation order, but we hope
19 and expect that that won't be necessary. And because of all
20 that, my two-hour closing is now reduced to zero, though I
21 would like to make a statement following Mr. Soto's
22 statement. Thank you.

23 THE COURT: Okay.

24 MR. SOTO: Your Honor, very briefly, we will not be
25 making a closing statement, but we've taken up the Court's

1 time significantly over the last month, and we just wanted to
2 thank the Court for all the accessibility that you've given
3 us. There were many times when we had to call you and your
4 office, and your entire staff has been amazing to work with
5 and given us the opportunity to present our arguments, and
6 your patience was, of course, paramount in all of that, and
7 we wanted to take the time to thank you for that.

8 THE COURT: Well, you're welcome, and thanks to all
9 of you for your hard work in achieving this resolution.

10 MR. WAGNER: Your Honor, I noted back on September
11 3rd that my role here was going to be limited. I didn't
12 expect I would be here every day, but it's been an absolute
13 privilege. It's been a privilege working with the folks at
14 Weil Gotshal, Mr. Perez and Mr. Soto, absolutely outstanding,
15 and Ms. Fish has been just invaluable. And like Mr. Soto, I
16 thank your Honor for all the many courtesies that you've
17 extended throughout the trial. The proceedings have been
18 conducted in a very dignified way. And most of all, I'm
19 prepared to throw out my watch because I think you're more
20 accurate than my watch. And, you know, that's a courtesy to
21 litigants as well. It's very important. And we thank all of
22 the Court's personnel. And, you know, although we opposed
23 the plan until the very -- really the very end -- we're the
24 last creditor group to settle -- we've tried to conduct
25 ourselves with respect to the Court, respect to our

1 formidable and now former adversaries at Jones Day, respect
2 for the city, its emergency manager, its officials, and its
3 citizens, many of whom have testified very eloquently, and I
4 hope that we've played a constructive role at this trial.
5 Thank you.

6 THE COURT: Well, you're welcome, and thanks to you
7 also, and let me also say on behalf of my staff you're
8 welcome as well.

9 MR. BENNETT: Okay. The first order of business,
10 the assignment that I wound up with is to read into the
11 record the additional provisions that will be included in the
12 confirmation order, and I'm told that these provisions are
13 directed at maintaining the status quo as between the COPs
14 and the COPs insurers, on the one hand, and the swap banks,
15 on the other hand. This is a little bit lengthy.

16 Notwithstanding anything to the contrary in this
17 confirmation order or the plan, open paren, including,
18 without limitation, Sections Roman II, capital B3, small p,
19 small i, capital A, comma, Roman III, capital D6, or Roman
20 IV, period, capital L, of the plan -- so that's IV.L, not the
21 Roman L -- the FGIC settlement or the Syncora, settlement,
22 close paren, colon. Item, open paren one, little i, close
23 paren. None of the form, method, mechanics, or allocation of
24 distributions in Section Roman II, capital B3, small p, small
25 i, capital A, of the plan nor any findings or orders of the

1 Bankruptcy Court related thereto shall or shall be asserted
2 or construed to affect or prejudice any rights, claims, or
3 defenses between the COP, capital C, capital O, capital P,
4 swap counterparties, comma, on the one hand, comma, and any
5 settling COP claimant, open paren, including Syncora, FGIC --
6 that's capital F, capital G, capital I, capital C -- and the
7 FGIC COP holders, close paren, or the COP insurer, comma, on
8 the other hand, period. Subject to the proviso at the end of
9 this paragraph, comma, the preceding sentence hereby amends
10 and replaces in its entirety the fourth paragraph of Section
11 Roman II, capital B3, small p, small i, capital A, of the
12 plan, semicolon.

13 Next paragraph, open paren, two little i's, close
14 paren. Neither, open paren A, close paren, any
15 determinations, adjudications, findings, or rulings in the
16 plan or by the Bankruptcy Court regarding the distributions
17 or consideration provided to the COP insurers or the settling
18 COP claimants under the plan, including whether such
19 distributions or consideration are solely for the benefit of
20 any particular parties nor, open paren, little B, close
21 paren, any acceleration or deemed acceleration of any COPs
22 provided for in the plan or by the Bankruptcy Court shall in
23 any way affect or prejudice any rights, claims, or defenses
24 of the COP swap counterparties including with respect to such
25 distributions or consideration, semi colon, and, open paren,

1 three little i's, close paren, no release or agreement by any
2 COP agent provided for in the plan, open paren, including,
3 comma, without limitation, any agreement not to sue any COP
4 holder or any COP insurer in Sections Roman II, capital B3,
5 small p, small i, capital A, of the plan, close paren, or by
6 the Bankruptcy Court, comma, shall in any way affect any
7 liability of such COP holder, COP insurer, or COP agent to
8 any COP swap counterparty, open paren, or to any COP agent on
9 behalf of such COP swap counterparty, close paren, or impair
10 in any way the rights or obligations of any COP swap
11 counterparty or COP agent, open paren, on behalf of any COP
12 swap counterparty, close paren, to sue any COP holder, comma,
13 COP insurer or COP agent, semi colon -- this is the last
14 paragraph -- provided, comma, however, comma, that
15 notwithstanding anything in this paragraph to the contrary,
16 the swap counterparties have agreed not to and shall not seek
17 to enjoin, block, prevent, subject to any lien, open paren,
18 other than a judgment lien, close paren, or otherwise
19 interfere with, open paren, one little i, the distribution by
20 the debtor of the Class 9 settlement asset pool and new B
21 notes to, comma, as applicable, comma, FGIC, the FGIC COP
22 holders, Syncora, and the settling COP claimants under and as
23 provided for in Section Roman II, capital B3, small p, small
24 i, capital A, of the plan, open paren, two little i's, close
25 paren, any performance, operation, administration of, sale

1 of, transfer of, assignment of, or other action with respect
2 to the FGIC development agreement, the Syncora development
3 agreement, or the tunnel lease, open paren, it being
4 understood that this clause, open paren, romanette ii, close
5 paren, shall not impair any rights or claims of the swap
6 counterparties to monetary damages related to such agreements
7 or the value therefore, close paren, or, open paren, three
8 little i's, close paren, except as a defense, counterclaim,
9 or claim against and in response to a party asserting a
10 counterclaim in each case asserted by either of the swap
11 counterparties distributions to FGIC, the FGIC COP holders,
12 Syncora, and the settlement COP claimants, open paren, as
13 applicable, close paren, of the proceeds of any of the
14 foregoing, period.

15 THE COURT: I look forward to trying to understand
16 that. All right. Before we begin with our closing
17 arguments, I need to find on the record that the evidentiary
18 record is closed. Anyone object to that? All right. The
19 evidentiary record is closed, and we will begin our closing
20 arguments.

21 CLOSING ARGUMENT

22 MR. BENNETT: Thank you, your Honor. Again, Bruce
23 Bennett of Jones Day on behalf of the city. I want to begin
24 where we started. This Chapter 11 case, of course, was filed
25 on July 19th, 2013, and it's hard to overstate the

1 significance of the fact that that's only 15 months and 8
2 days ago. I think it's definitely true that every
3 significant general purpose municipality I can think of other
4 than those dismissed because the debtor was ineligible has
5 taken far longer, and the smaller but still noteworthy
6 Chapter 9 cases of Stockton and San Bernardino will also last
7 much longer. Even Orange County, which was the prior record
8 holder for large case successful completion in Chapter 9,
9 lasted 18 months. I will say in fairness to the other people
10 who worked on that, we kind of slowed down on purpose in the
11 end because, unlike the Detroit case where the exit financing
12 will be issued in a public offering later, in Orange County
13 the exit financing was a public offering that was issued
14 right on the effective date.

15 The city firmly believes that for general
16 purposes -- for general purpose municipalities limiting the
17 length of a Chapter 9 case is not a small thing. It's a very
18 big thing, and there's lots of reasons about this, but I'm
19 going to focus on one, and this is one time I'm going to
20 refer to press accounts not for the truth of anything that
21 they say but for the fact that few, if any, press accounts
22 about this case and, frankly, even every article about the
23 City of Detroit published outside the City of Detroit refers
24 to the fact that Detroit is in a bankruptcy case, and
25 actually more often than not they refer to the fact that

1 Detroit is in a bankruptcy case more than once, and this just
2 isn't good. It's not helpful. It doesn't do much to attract
3 residents and businesses to the city, which, as we'll see
4 later, is extremely important to the city's overall recovery,
5 and even people who are on the precipice of or interested in
6 investing in the city, it's just all too easy to say to
7 themselves or to -- in the discussions where people talk
8 about proceeding, "Well, why don't we wait until we see how
9 that comes out?" Even today many people who read articles
10 which have reported the parade of settlements, the fact that
11 there are very few objectors left in the case, don't fully
12 understand the extent of progress already made or fully
13 understand that the end really is in sight notwithstanding
14 the unfinished business we have here today.

15 We depart just a little bit from your Honor's
16 witness in believing that the benefits of moving forward
17 vastly outweigh any conceivable advantages of slowing down
18 the progress of the case. We're not sure that there even are
19 any. What Ms. Kopacz says is that there would be more
20 information available. You would see that the restructuring
21 had advanced further, and maybe some risk would be out of the
22 numbers, but the reality is is -- or excuse me -- the reality
23 of experience is is it's not true; that, yes, you will learn
24 more information about some things, but there will be just as
25 many uncertainties about the future. They'll just be

1 different ones.

2 I also think that we can learn things from the
3 Chapter 11 model, and while this is debated as being a good
4 or a bad thing, increasingly in Chapter 11 cases the Chapter
5 11 case is confined to focuses on fixing the capital
6 structure, and fixing the operations may well begin during a
7 Chapter 11 case if it's required, but very frequently it
8 extends afterwards. That's partly because constituents want
9 to set value based upon circumstances as they are and not as
10 they're changed through a restructuring, but it's also
11 because businesses aren't helped by newspaper articles that
12 begin and end with the words "Company X, Y, Z is in
13 bankruptcy," so it was a priority very early on for the
14 debtors -- for the debtor; sorry -- the debtor, the emergency
15 manager, the entire professional team, that we were going to
16 put this case on a fast track. I think the very first time I
17 spoke to your Honor, it was about scheduling eligibility,
18 which had become a big problem in a lot of cases because it
19 extended on for a long time, and we think that it is -- we've
20 succeeded in this regard with your help. We are actually a
21 little bit off schedule, somewhere around a month, but in the
22 scheme of things, that's not bad, and the ultimate -- the
23 fact that we're going to have an ultimate conclusion in this
24 kind of time frame is terrific.

25 There's a second point I want to comment on, and I

1 think the start of this hearing really focused on this as
2 well, which is that this plan is very broadly consensual at
3 this point, and all -- and the city has settled with all of
4 the major objectors and all of the major economic players in
5 the City of Detroit. Of course, the case did not start out
6 that way, and, in fact, it's hard to think of any major
7 constituency that was not involved in litigation concerning
8 some aspect of its rights against the city. I think,
9 frankly, the only exception I could think of is the swap
10 parties didn't actually get involved in litigation, but
11 Syncora, by participating in that area, actually made up for
12 that. The transformation of a case from one that is so
13 litigious and involves so much disagreement to one that
14 involves this amount of consensus in so little period of time
15 is also very remarkable.

16 Third point is to focus a little bit on the plan. I
17 was present at the creation of the city's reorganization
18 strategy, and I will tell you that the one thing every other
19 person who was there understood was that the city would be
20 proposing a plan that would be regarded as radical, and I've
21 chosen that word very carefully, even if it had solid legal
22 support. Again, we should not lose sight about how much is
23 being accomplished here even though there is much more left
24 to be done. There is no municipal debt adjustment case ever
25 that resulted in the discharge of more than \$7 billion of

1 claims and the significant deferral of the remaining
2 obligations no matter what inflation factor you want to
3 attach to historical numbers. No case has ever carved out
4 anything like \$1.7 billion in funds to rebuild a distressed
5 municipality. No case has carved out numbers that are as
6 material as that relative to the size of the Chapter 11 case.
7 Nothing has come close. Again, doesn't matter what inflation
8 factor you choose or how far back you go. That the plan
9 includes such dramatic and important changes at the point of
10 confirmation and that this wasn't lost, watered down, or
11 disappeared as a result of running through the Chapter 9
12 process is, frankly, remarkable and I think not widely
13 expected when the case began.

14 So the next remarkable development is, frankly, your
15 Honor entering a confirmation order. I've actually prepared
16 to talk about a lot of things, but I'm going to try to spend
17 less time on each of them. The points that I'm covering are
18 those which the Court has to focus on to confirm this plan
19 because it was, in fact, rejected by two classes of claims,
20 and there are dissenting votes in other classes. And to the
21 extent that there are other confirmation tests that are
22 applicable that aren't really related to those two aspects or
23 were not the subject of a specific request by your Honor that
24 I cover them, I have left them out, and they are covered in
25 the papers. At opening I referred you to the table that's

1 attached to our pretrial brief. It's a good place to go to.
2 You can find where we think we proved everything.

3 We owed you, your Honor, a supplemental declaration
4 concerning voting. It was filed, the second supplemental
5 declaration of Michael J. Paque I think is the way he
6 pronounces his name. I hope your Honor has it or I --

7 THE COURT: Yes. I saw it. Thank you.

8 MR. BENNETT: Okay. Stay organized. When I started
9 at the opening, I started with the topic of what creditor
10 rights really were against the City of Detroit and in
11 specific, in particular, what unsecured creditor rights were
12 against the City of Detroit. I'm going to start there again
13 because it's still important just in a very superficial
14 summary. I'd be happy to go into depth on any part. Our
15 approach is to start with Michigan law where very clearly
16 under Michigan law the exclusive remedy of an unsecured
17 creditor is to obtain a judgment under the Revised Judicature
18 Act and ultimately an order of a court directing the city to
19 levy attacks for the judgment. No unsecured creditors have a
20 right to attach an asset, levy on an asset, or otherwise
21 compel the sale of an asset and apply proceeds to pay a
22 claim. Michigan law. We saw it, and we -- that it's very
23 different from the rights of an unsecured creditor against a
24 corporation, wholly different body of law. The city
25 believes, still does -- believed then, still does, that this

1 defines what the reasonable expectations of creditors of
2 Detroit are, and also, as a corollary, it's a warning to
3 everyone not to lend money to a municipality based on an
4 expectation that a creditor can compel an asset sale.

5 And the next step in our reasoning was that Chapter
6 9 doesn't change any of this, and this is -- in addition to
7 looking through Chapter 9 and looking for a provision that
8 might augment the rights of creditors, there are numerous
9 provisions that you stumble into that are consistent with the
10 view that Chapter 9 is not about deploying municipal assets
11 to pay unsecured claims, and I listed a bunch, Bankruptcy
12 Code, Section 904, limiting court jurisdiction over assets,
13 the absence of anything like a property of the estate
14 concept. Of course, it wouldn't be called property of the
15 estate in Chapter 9. It would be called property of the
16 debtor, but there's nothing like that there. The turnover
17 provision isn't there. If assets were important, why not?
18 There are no controls on the use of property outside the
19 ordinary course of business, and, again, with one irrelevant
20 exception that we talked about, Chapter 9 just doesn't have
21 anything that augments creditor rights. This reading of
22 Chapter 9 was never rebutted by anyone. We have found no
23 cases to the contrary. We talked about the cases that were
24 cited. They are not to the contrary. Mr. Perez's citation
25 to an early decision by Judge Klein to the effect that the

1 confirmation hearing is the ultimate test of what a
2 municipality does in a Chapter 9 case, that is what Judge
3 Klein said, more or less, but what he was referring to was
4 the confirmation standards, and the confirmation standards
5 apply to rights that creditors do have. They don't apply to
6 rights that creditors don't have.

7 Your Honor indicated at one of -- in the last couple
8 days of the trial that you wanted to discuss Fano, but I
9 suspect your interest in that case is related to the findings
10 required under the best interest test related to taxes, so
11 I'm not going to revisit Fano here, but I will get to Fano
12 when we talk about best interest. We talked about a lot of
13 cases in this area during opening. I'm going to skip over
14 them.

15 So what did all this mean for the trial? Well,
16 there was no requirement, in the city's view, that the Court
17 hear evidence concerning efforts to value assets, efforts to
18 market assets, conduct of due diligence on assets, dividing
19 them into core or noncore. We regarded all those issues --
20 we do regard all those issues as quite irrelevant in the
21 Chapter 9 context, but I'm going to end this topic with
22 asking everyone to bear one point in mind. In fact, as part
23 of this -- as part of the city's restructuring under Chapter
24 9, the city did deploy city assets to facilitate its
25 restructuring, and it did so in all cases in creative ways.

1 I'm about to turn to the first example, which is the DIA
2 settlement, but I also want to remind everyone that the
3 COPs/FGIC and COPs/Syncora settlements both deploy city
4 assets but deploy city assets in a way that they are used
5 only in the context where the creditor receiving the assets
6 is going to have to invest money, assist in the city's
7 rehabilitation in order to extract value from those assets.
8 We'll have a little bit more to say about it later, not much.

9 Your Honor also asked for a list of settlements. We
10 can put it up on the screen, but I also have hard copies.
11 With your Honor's permission, I'll give you some hard copies.
12 I've given it to all of the people present who I identified
13 as being interested. Is there anybody else who wants a copy?

14 THE COURT: Just so you know, my specific question
15 was --

16 MR. BENNETT: What was it? Sorry, your Honor. I
17 just wanted to get a copy first of this one.

18 THE COURT: Right, of course. My specific question
19 was which of these settlements you are asking for court
20 approval of.

21 MR. BENNETT: Your Honor, I'm asking for court
22 approval of all of the settlements.

23 THE COURT: Okay.

24 MR. BENNETT: And the -- we could have a short
25 argument as to whether 9019 technically applies to all of

1 them, and I don't think 909 (sic) does technically apply to
2 all of them, but the plan is built on all of these
3 settlements, and so whether it was technically required under
4 9019 or whether we think it's appropriate incident to all the
5 things that are happening in the plan, I think we seek
6 approval of all of them. I mean we do seek approval of all
7 of them.

8 I want to point out, you know, that when we -- that
9 we -- the top two, the DIA settlement and the state
10 contribution agreement, as we colloquially, everyone else
11 colloquially refers to them as the grand bargain together,
12 but they're actually two separate settlements, albeit
13 conditioned on each other. The UTGO settlement we've talked
14 about quite a bit, same with the LTGO settlement. The
15 retiree settlement, this includes many different components,
16 and -- but ultimately the treatment of the classes, the AS --
17 how ASF was dealt with, what happened with the amount of the
18 OPEB claim, all of these, including the, you know, kind of --
19 the assessment of the underfunded amount of the pension
20 plans, all these things were part of a big agreement reached
21 in mediation. It ultimately informed things that are in the
22 plan, and it ultimately forms things that -- whether or not
23 it was separately approved, the votes would mean that they
24 would be implemented pursuant to the plan, but we see it as a
25 settlement, nevertheless, so that is our list, and we seek

1 approval of all of them.

2 THE COURT: All right. So I notice that what's not
3 on the list is the Great Lakes Water Authority, any
4 collective bargaining agreements, and the agreement with the
5 Detroit Public Library constituency, and that's fine with me.
6 I just want it clear on the record.

7 MR. BENNETT: The library -- I would certainly not
8 be offended if your Honor decides to approve that settlement
9 as well. That's been documented as a --

10 THE COURT: I'll only do it if you ask for it.

11 MR. BENNETT: Okay. I don't think it's necessary.

12 THE COURT: Okay.

13 MR. BENNETT: That one is purely plan treatment.
14 And I don't know whether -- I just should have looked at this
15 before I got here. I will check at the break. I don't know
16 whether the confirmation order includes anything with respect
17 to the Great Lakes Water Authority. It probably does, but
18 let me check, and I'll specifically --

19 THE COURT: Okay.

20 MR. BENNETT: -- highlight them after the break.

21 THE COURT: Okay.

22 MR. BENNETT: Again, nothing controversial. Okay.
23 So why did I start with settlements at the opening, and why
24 do I start talking about settlements here? It's because they
25 do form the building block of -- building blocks of what

1 comes next, which is the application of the different
2 confirmation tests. These settlements resolve disputes about
3 what the city has, what the city owes where there are
4 disputes or uncertainties on these things, and that's one
5 thing in common, frankly, of all of them.

6 Again, in the interest of time, none of these
7 settlements attracted much controversy except for the DIA
8 settlement, the LTGO settlement, the releases with respect to
9 the state settlement, and I think the ASF -- although we'll
10 hear later today, the ASF piece of the retiree settlement. I
11 think those are the parts that were at any point in time
12 controverted. As I read the record, there is no longer any
13 controversy with respect to the DIA settlement, that having
14 all been -- all those objections having been resolved, and I
15 think, unless I missed it during the trial, no one got to
16 object to the LTGO settlement, so what I'm going to do to
17 deal with settlements is I'm going to talk about the DIA
18 settlement and the evidence that was educed to support it
19 because I think that's important, and I'm going to hold the
20 ASF piece of the retiree settlement until after we hear from
21 the two objectors, who I think are going to speak on that
22 topic, and then we'll revisit that. And as to the rest of
23 them, I will answer any questions your Honor has.

24 THE COURT: Well, I think that many of our pro se
25 objectors do object to the DIA settlement to the extent it

1 protects the art in this context, in this bankruptcy, from
2 their pension claims.

3 MR. BENNETT: Okay. Well, I'm going to cover it --

4 THE COURT: Okay.

5 MR. BENNETT: -- so we'll cover it fairly
6 thoroughly. Okay. I chose to emphasize the DIA settlement
7 because it informs the fair discrimination test as applied to
8 the remaining objecting classes and the best interest test
9 applicable to dissenters within the retiree class. And,
10 again, just so the record is clear, by the DIA settlement, we
11 mean the agreement to transfer title to the DIA assets to
12 what I've called for a long time the DIA Corp. in trust in
13 exchange for, and then here's the important part -- yes,
14 there is a sum of money from the foundations and the DIA
15 Corp., but -- and there are clearly restrictions on how that
16 money can be used, although I don't think those restrictions
17 are controversial anymore. The attorney general and the DIA
18 Corp. dropped their objections to any dispositions of the DIA
19 assets, and here's the point that frequently gets lost. The
20 city obtains a commitment that the DIA assets will stay in
21 the City of Detroit and the DIA will stay in the City of
22 Detroit. And an important part to start with is that while
23 there have been rumors of alternatives for raising material
24 dollars from the DIA assets in other ways than through the
25 grand bargain or the DIA settlement, none of them have this

1 element of value. A sale certainly wouldn't, and to be
2 clear, because it just seems to be glossed over over and over
3 again, a loan doesn't work that way either. A loan that is
4 secured by the art would have to be paid. There is no money
5 in the projections to pay a large art loan, meaning an art
6 loan that would generate vastly more proceeds than the exit
7 financing that we will talk about later, and the city's
8 numbers with the projections which would show you, you know,
9 if there was space for the repayment of such a loan are, in
10 what I think is a technical term adopted in this case,
11 skinny, which means that there isn't room. There isn't room
12 in the projections to take on additional debt even if you can
13 borrow based upon the collateral. Those who would be making
14 such a loan would be very, very, very well covered by value
15 of art. Otherwise the loan wouldn't be made. It may well be
16 that some advocated that position on the view that when the
17 loan came due, people would be motivated to come up with the
18 money to pay it somehow, some way. That is not the way to
19 make a restructuring of a city and something that the city
20 was, therefore, never willing to consider.

21 So the settlement approval elements that we have to
22 cover with the art is -- with the DIA settlement is whether
23 or not the deal that was reached, the bargain that was
24 reached was arm's length and noncollusive by well-represented
25 adversaries, and then most of our time what I said are three

1 factors that are in the cases, probability of success in
2 litigation, difficulties of collection, complexity of
3 litigation, including expense, inconvenience, and delay
4 attending to it, and these three things get kind of mixed
5 together or combined into the process of constructing a range
6 of reasonableness, and the settlements are approved if
7 they're above the lowest bound of the range of
8 reasonableness.

9 And, lastly, the Court also is supposed to be
10 informed by the interests of creditors in a proper deference
11 to their reasonable views. I am now in a position to say
12 that the creditors are substantially all supportive, not
13 entirely supportive but substantially all supportive of this
14 settlement.

15 So going through the steps, who are the adversaries
16 and were they at arm's length, the evidence showed there were
17 lots of adversaries. They did bargain at arm's length, and
18 there is no evidence of collusion. The city was at arm's
19 length from the retirees. There was testimony from Bloom and
20 from a member of the committee that said exactly that. There
21 was never any allegation that the city was not at arm's
22 length from the UTGO creditors who were interested in this
23 issue. There was no allegation or evidence that the city was
24 not at arm's length with the LTGO creditors, and I don't
25 think your Honor needs any more evidence that the city was at

1 arm's length with the COPs, with Syncora, and with FGIC. All
2 these parties were adequately represented, and they
3 vigorously represented themselves.

4 There is also no indication that the city was not at
5 arm's length from the foundations. Your Honor heard
6 testimony I think from Mr. Rapson that demonstrated that the
7 foundations had their own agenda and pursued it. And there
8 was ample evidence that the city was at arm's length from the
9 DIA Corp. This was demonstrated I think partly by their own
10 role in the trial, by the testimony of Mr. Buckfire, who
11 recounted some of the early meetings with the DIA Corp.
12 before the mediation included them, and by the testimony of
13 Annmarie Erickson, the officer of the DIA Corp. who was here.

14 I said during opening that the showing of an arm's
15 length negotiation does not require either proofs of the
16 step-by-step of who did what to who during the entire process
17 of the negotiations or exactly how much legal research and
18 valuation and analysis was done. That, in fact, is the case
19 from the cases. The cases demonstrate that those are not
20 appropriate area of inquiries. That is a good thing for
21 another reason because otherwise to rebut Mr. Kieselstein's
22 allegations, many members of the city's team would have had
23 to take the stand to testify that they weren't lethargic or
24 lackadaisical. As you can remember, a central theme was that
25 the city never did enough, but I think the -- while we don't

1 have to prove that, I think the record that was demonstrated
2 during the trial was that the city did an awful lot and
3 understood an awful lot. That their position evolved over
4 time does not mean that they -- that the city didn't do the
5 work. It just means ultimately they didn't agree with some
6 of the other parties.

7 But because the law doesn't require demonstration of
8 the negotiation steps or proof and analysis of how people
9 change their mind or why people change their mind and what
10 work they did is one of the reasons why the mediation
11 confidentiality order does not prevent the Court from
12 appropriately evaluating settlements, which was an allegation
13 by many. It's just not true. The law doesn't work that way.

14 On the -- oh, in addition to Mr. Buckfire's
15 testimony, which talked about some of the work that the city
16 did do in connection with evaluating the art, Mr. Orr
17 provided additional testimony about the city's journey as it
18 related to the DIA assets. Additionally, your Honor heard
19 testimony from a Christie's representative that all of that
20 was part of the city's due diligence in this area.

21 So we now turn to the part of the DIA settlement
22 that I think consumed the most time during the trial, which
23 is the issue of what is the range of reasonableness that your
24 Honor should focus on in determining whether or not the
25 settlement should be approved, and I said at opening that

1 there are three questions that have to be addressed. First
2 question is can the city sell the DIA assets, and that's the
3 one as to which most of the ink was spilled by the DIA Corp.,
4 on the one hand, and by objectors, on the other hand. The
5 second, which I think is the most important and decisive
6 question, do creditors have any right to compel the sale of
7 the DIA assets and recover from them we've talked about
8 already. And the third is should the city be compelled to
9 sell the DIA assets, which really has to do with the whole
10 question of is it a good idea even if the questions one and
11 two were both yes. Your Honor heard evidence on two of --

12 THE COURT: All right. Excuse me. Before you
13 launch into this really important subject, I've been advised
14 that there is a phone call I have to take, so I'm going to
15 take a break now and do that. Before I do that, though, let
16 me ask is there a representative of the city law department
17 here?

18 ATTORNEY: Yes, your Honor.

19 THE COURT: All right. I'd like --

20 MR. RAIMI: Charles Raimi, deputy corporate counsel.

21 THE COURT: Thank you. I'd like to see you and Mr.
22 Cullen, please, in chambers in the jury room which is right
23 through the door behind the screen there, and we'll reconvene
24 at ten o'clock, please.

25 THE CLERK: All rise. Court is in recess.

1 (Recess 9:40 at a.m., until 10:00 a.m.)

2 THE CLERK: All rise. Court is in session. Please
3 be seated.

4 THE COURT: My apologies to you. You were on a
5 roll, and I regret that I had to interrupt it, speaking of
6 which I know you're excited to be here, but I need you to
7 slow down just a little bit for me.

8 MR. BENNETT: Okay. I think I can do that. Okay.
9 So where we left off I was -- I listed again the three key
10 questions that inform the range of reasonableness for the DIA
11 settlement, and I'm now going to turn to them each
12 individually and talk about them a little bit. The first is
13 can the city sell DIA assets, and with all of these, I guess
14 it's important to remember that the Court's obligation is to
15 canvass the issues. You're not required to conduct a trial
16 and decide how these would come out. I think the record that
17 was developed was ample -- more than ample to allow your
18 Honor to have canvassed the issues and develop a sense for
19 what the range of outcomes and a reasonable range of outcomes
20 for the different issues is.

21 In the case of issue number one, the can the what
22 I'll call the DIA assets be sold issue, your Honor has papers
23 on all sides of the question that cover the factual
24 background. There were a large number of exhibits that were
25 entered into evidence that cover the factual background, the

1 legal arguments on both sides concerning the -- whether or
2 not there's an overall trust, either a charitable trust or a
3 public trust that covers the DIA assets, and whether there
4 are separate restrictions that cover individual items or
5 groups of items in the DIA collection. I'm not going to go
6 through all of those factual details. I'm happy to answer
7 any questions about any part of it. There's also an attorney
8 for the DIA Corp. here who might also be available to answer
9 questions but I understand is not going to be making any
10 prepared remarks today. At the opening, we reported that we
11 saw compelling arguments on all sides. The evidence that is
12 in the record was cited in different ways by both sides in
13 support of their positions. From the city's perspective, a
14 reasonably possible outcome is that no DIA assets could be
15 sold and a court could reach that result finding that there
16 has -- was initially and has at all times been a charitable
17 trust, albeit with potentially differing trustees as the
18 museum went through time, and it's also possible that a court
19 could conclude that even if there isn't a trust that covers
20 all of it, there are restrictions that cover significant
21 parts of it that either have to be enforced or would give
22 rise to interests that attach to the proceeds of any sale.
23 From the city's perspective, since a reasonable outcome -- a
24 genuinely foreseeable potential outcome is that the entire
25 collection is protected from sale by applicable law as a

1 charitable or public trust and that, frankly, the museum
2 could be hurt if the litigation was even started, we think
3 that question number one points to a low end of the range of
4 reasonableness at near zero.

5 So we now turn to question two. Question two was
6 can creditors compel the sale of DIA assets, and this
7 question is important because ultimately formulated many ways
8 we're talking about expectations of creditors informed by the
9 background law and by alternatives outside of Chapter 9, and
10 as we have seen in great detail at opening, in less detail
11 here, that unsecured creditors of Michigan municipalities do
12 not have an opportunity to get liens on, attachments against,
13 or compel sale of assets in order to pay debts in any
14 circumstances and that nothing in Chapter 9 changes this, the
15 value that creditors could extract from the DIA assets if the
16 city was unwilling to sell them, whether or not it could, is
17 zero. On this point, there's never been any contrary
18 authority. The cases that were originally cited as contrary
19 to this, they're not distinguishable. They're just
20 different, and some of them arise in circumstances where the
21 issue doesn't appear to ever have been litigated. There are
22 no facts that were or could have been offered on this point,
23 and so we submit that question number two points to the lower
24 bound of reasonableness for settlement with respect to art is
25 at zero because that is what creditors could achieve both

1 outside of Chapter 9 and inside of Chapter 9 if faced with a
2 determined opposition by the city to do anything to raise
3 value from the DIA assets.

4 And question number three, which is more intensely
5 factual, is should the city sell the DIA assets, and your
6 Honor heard testimony on this point from many witnesses, and
7 I think it was also the subject of some of your Honor's own
8 questioning. Without going into the details, Mr. Orr
9 testified on the importance of the DIA to the city, the DIA
10 witness, Annmarie Erickson. Council President Jones had
11 remarks on this point as well. There was actually some
12 information from the Christie's witness about the importance
13 of the museum and what would happen to it if there were
14 sales. There isn't really a dispute that the DIA is a
15 nationally prominent cultural institution that contributes to
16 the city. It contributes to the image of the city. It
17 contributes to the city's rehabilitation. It might even
18 contribute to bringing residents back. So what does that
19 mean? It means that it is most assuredly a reasonable
20 decision for Detroit to make to keep the DIA assets, to not
21 liquidate them, to not sell any because of the consequences
22 of selling even a few on the standing of this real national
23 treasure in the museum world and its ability to continue to
24 mount exchanges and shows and otherwise be a participant in
25 the museum community. And it's also a reasonable decision

1 for the city to want and to keep a world-class art museum or
2 any world-class institution in the city as a potential
3 contributor to its future. Additionally informing this
4 test --

5 THE COURT: Well, in the abstract, that's well and
6 good, but what do we say to the pension claimant whose
7 pension is impaired as a result of that decision?

8 MR. BENNETT: We say to pension claimants in this
9 instance what we say to other creditors, which is that even
10 pension creditors have rights against municipalities that are
11 defined by statute, and there's no background law that says
12 to even a pension creditor that a pension creditor can be
13 paid by causing the city to liquidate its assets. You know,
14 many -- a few people already have started to ask me to talk
15 about this Chapter 9 case after it's over, and one of the
16 points that I plan to make, which is, I guess, responsive, I
17 think, to your Honor's point here, because I think it's where
18 your question comes from is that I think for years for labor
19 unions, labor representatives, pension funding hasn't been a
20 topic that had a high priority at the bargaining table; that
21 what happened at the bargaining table was that union
22 representatives negotiated for higher pay, of course a great
23 thing, for higher benefits, of course a great thing, but when
24 it came to deciding how they would be funded, deciding what
25 kind of investment return assumptions could be adopted by a

1 city, deciding what kind of asset smoothing regime could be
2 used to defer contributions when investment returns fell
3 short, that wasn't high on the agenda in bargaining units,
4 and I think, "A," an implication of your Honor's ruling,
5 which I regard as undoubtedly correct, that pension claims
6 can be impaired in bankruptcy -- it's since been followed by
7 Judge Klein in the Sacramento case -- excuse me -- the
8 Stockton case -- it's in Sacramento, but it's the Stockton
9 case. One of the points of information out of this case is
10 that pension funding belongs on the labor agenda because it's
11 not unalterably guaranteed by a constitutional provision, and
12 it's not unalterably guaranteed by every last asset that a
13 municipality has. Like all other unsecured claims against
14 the city, to the extent of underfunding -- it's an unsecured
15 claim -- it can be paid only through city taxing power, and
16 sometimes in some cases the taxing power just isn't there,
17 and we'll get to that when we come to the best interest test,
18 but the -- when I spoke about the limitations of unsecured
19 creditor rights against assets of a municipality, I wasn't
20 just talking about bondholders. I was also talking about the
21 stationery salesman, and I'm also talking about employees.
22 The law is the same.

23 Picking up where I was on the issue of the
24 reasonableness of decision, there's more reason in Chapter 9
25 to be deferential to a city's decision on this point or,

1 frankly, on any point that deals with management of assets.
2 It's the same provisions I've been talking about in other
3 contexts, the presence of Bankruptcy Code Section 904, the
4 absence of restrictions on the use, sale, or lease of
5 property. If Chapter 9 was about liquidating some or all or
6 noncore or any assets, you would expect different provisions
7 than the ones that are in Chapter 9. And, again, I'm going
8 to foreshadow things I'll talk about in more detail later.
9 There are actually many more cases than the ones that I
10 discussed at opening -- I'll add some of them when we get to
11 best interest -- that talk about that the measure of a
12 municipality's ability to pay debts is the taxing power,
13 period, end of story. It comes up in all kinds of other
14 contexts not in cases where assets were in play where courts
15 say that very frequently. They've been saying it since the
16 great depression.

17 Okay. So where does that -- question three, again,
18 points to a range of reasonableness where the low end of the
19 range is zero because I do believe in the circumstance that
20 Detroit can under the law and responsibly on the record of
21 this case make a decision not to sell DIA assets, and that
22 decision would have to be upheld.

23 So we have a situation where all of the relevant
24 inquiries point to a range that includes zero or is very
25 close to zero, and so where did we fall in this range? Well,

1 where we fell in this range is the -- clearly the
2 contributions by the foundations and the DIA Corp. which sum
3 up to \$466 million, I think, or something in that ballpark,
4 and that's not zero, and it compares, frankly, well with the
5 only estimates that we have of what the overall collection
6 would really get, and we don't really know what the top of
7 the range is. Of course, this is not -- this is not like
8 inventory where's other inventory selling all the time, you
9 know. If we had an inventory of nuts and bolts, we could
10 figure out what nuts and bolts were worth. If we had an
11 inventory of oil, we could figure out what oil is worth
12 because someone is selling oil. Someone is selling nuts and
13 bolts. And the reality is two things about the art market
14 that I've learned as a result of this case and hadn't fully
15 appreciated before, which is, yes, there are a number of
16 very, very valuable works of art in the world, and there
17 turns out to be a number at the Detroit Institutes of Arts,
18 but as the testimony in this case has demonstrated, the
19 number of pieces that are really valuable is very few
20 relative to the overall population. And the second part we
21 learned about the art market in this case that I didn't
22 really appreciate before and probably knew if I'd thought
23 about it, which is that it's not deep, that there's just a
24 certain amount of art that moves in the different categories
25 at any given period of time, and it's not a lot. It's not

1 like the oil market. It's not like the nuts and bolts
2 market. It's not like the real estate market. A few times a
3 year there's some blockbuster sales. A limited number
4 changes hands. So we don't know what the upper end is. The
5 city believes that its responsible work points to a number in
6 the \$2 billion range, and if that's the upper end of the
7 range -- and we don't think it is because of all of the
8 potential problems of getting from here to there, and we do
9 think at the end of the day there are going to be some
10 restrictions that are going to be either, "A," withheld or,
11 "B," have to be effectively protected through an interest
12 attaching to sales, a number in the vicinity of 466 million
13 is very clearly in the range of reasonableness.

14 I said at the beginning that it's also important to
15 take a look at the reasonable creditor views, and
16 notwithstanding that there were very vociferous objections,
17 at the end of the day, those objections were abandoned, and
18 they were abandoned in ways that your Honor can look at the
19 settlements and realize that those were abandoned not because
20 they got something else that was worth as much as the art but
21 because, at the end of the day, those claims were weak or
22 these objections were weak.

23 To summarize with respect to this part, the DIA
24 settlement was negotiated at arm's length without collusion
25 by well-represented adversaries. The settlement is well

1 above the lower bound of the range of reasonableness, which,
2 for the reasons we stated, is a number that is zero or rounds
3 to zero. It is overwhelmingly supported by the creditors,
4 and it should be approved.

5 It wasn't pressed at the trial. There were
6 allegations that this transfer -- the proposed transfer as
7 part of the DIA settlement would constitute a fraudulent
8 transfer. Of course, it doesn't because if it's part of a
9 reasonable settlement, it is, by definition, not a fraudulent
10 transfer. I think, as a result, we will include provisions
11 to that effect that it's not a fraudulent transfer in our
12 confirmation order, but I don't think we have to talk about
13 it anymore.

14 I think at this point if your Honor has questions
15 about other settlements -- and I will come back to the
16 releases question. I have a whole section on releases that I
17 don't think we need to spend much time on the remaining
18 settlements. I was informed that --

19 THE COURT: I leave it -- I leave it to you.

20 MR. BENNETT: Okay. I was informed during the break
21 that the collective bargaining agreements do provide for
22 Bankruptcy Court approval of the agreements rather than the
23 settlement, so that will be in the confirmation order as
24 well. I don't think it's controverted.

25 THE COURT: Okay.

1 MR. BENNETT: Okay. At this point, I want to move
2 to best interests, and there are two branches of this test
3 really, but they overlap a lot. The first branch, which is
4 also essentially the same as the judicial interpretation of
5 the application of the fair and equitable test to Chapter 9
6 cases, deals with meeting reasonable expectations of
7 creditors, so whether I talk about the best interest tests or
8 fair and equitable, I'm really talking about the same test.
9 And then the second part of the best interest test is whether
10 the plan is better than alternatives and, in particular, the
11 non-Chapter 9 alternative, which is sometimes colloquially
12 referred to as dismissal. Here again, we have to start with
13 asset sales, and I'm going to start with asset sales because,
14 as I pointed out, the city is firmly convinced that it has no
15 obligation to deploy assets in order to make -- to generate
16 higher recoveries for creditors. There is no reasonable
17 expectation that anyone could conceivably have, based upon
18 the background law in this area. It turns out that the city
19 did deploy assets in order to try to emerge from its Chapter
20 9 case and make consensual deals, and in order to do so, the
21 evidence shows the city did a ton of work on its assets to
22 see what could be monetized, the word used most often in the
23 case, in order to make this case easier for creditors and to
24 generate more value. Clearly in -- I talked about it in
25 already -- in the DIA area, there was an investigation.

1 There was aggressive initial positions taken by the city with
2 respect to efforts to raise money from the DIA. There was a
3 valuation exercise that was undertaken. There was lots of
4 work done.

5 Belle Isle. Belle Isle has been by some creditors
6 criticized, but the reality is by transferring Belle Isle
7 pursuant to a lease, not a sale, to the state, the entire
8 cost of maintaining Belle Isle came off the city's books,
9 and, therefore, money was saved, which means at the margin
10 money was generated to be used for other purposes, and by
11 reason of the determination that the plan is skinny at the
12 margin, it was used for other purposes, including creditor
13 recoveries. So saving money by an asset disposition is,
14 frankly, the same as raising money.

15 Your Honor is also aware from the record in this
16 case that the city looked at DWSD from many different
17 perspectives, and one of them was efforts to maximize value,
18 which I'm going to define for these purposes as raise money
19 for the general fund in connection with any form of
20 disposition. Certainly the city did tons of work in this
21 area. Others, of course, had very strong views about whether
22 or not DWSD or any part of DWSD's value could ultimately make
23 it to the general fund because of its special status as
24 effectively a utility that performed services for fees. What
25 we have in the end is a solution that I guess from the

1 creditor perspective does not really generate net dollars for
2 the general fund -- excuse me -- but what it did do was it
3 generates a fund that can be applied to repair the city DWSD
4 infrastructure. And if that didn't happen, the city would
5 have had to find the money elsewhere to do that, and so you
6 could have tacked an additional potential RRI or take a chunk
7 of the RRIs and devote them to rehabilitation of the water
8 and sewer system within the City of Detroit. It really can't
9 be argued that that work would ultimately have to be done,
10 so, once again here, a disposition of the assets, although it
11 did not generate dollars into the general fund that could be
12 sent to other creditors, there's certainly the contribution
13 for purposes of meeting the pension obligations of DWSD
14 personnel, the acceleration of that, which helps the numbers
15 all work, but there wasn't an extra \$50 million a year as was
16 at one point sought, and there were even some estimates that
17 the city should get even more, but there was the use of the
18 DWSD assets in a creative transaction that effectively
19 reduced another cost that the city would otherwise have to
20 bear.

21 The tunnel. There was a continuing story in this
22 case that every professional involved, and I'm sure Mr. Orr,
23 experienced -- I'm sure he gets -- I got stomach aches; he
24 probably has ulcers -- and that is is that as we investigated
25 more and more about more and more things, we found that the

1 consequences of running the city for so many years with an
2 over indebted condition fanned out in all kinds of ways, and
3 your Honor saw a lot of it, I think, during the bus tour, and
4 I'll particularly remind you about your visit to the police
5 precinct. Well, it turned out -- and we discovered this
6 relatively later on -- that the deferred maintenance extended
7 to the tunnel as well, kind of stumbled into that by
8 accident, thought we understood everything at that point, but
9 it turned out we didn't, and the -- so, once again, the
10 tunnel deal includes a provision that extends the term, has
11 offsets for the use of revenues that would otherwise come
12 from the city in the future to cover CAPEX that, frankly, is
13 going to have to get done that the city would otherwise have
14 to pay for, so, once again, we have an asset that -- just a
15 part of this deal -- there's many other aspects of this deal,
16 but part of this deal relieves the city from an obligation
17 that it would have or an obligation that it should undertake,
18 one or the other -- I think it's a very -- those things are
19 very close together, and, again, an asset is deployed to
20 solve a problem. The evidence showed that there was an
21 effort to look at the Coleman Young Airport to see whether or
22 not the Coleman Young Airport could generate anything towards
23 a restructuring. The answer was there really isn't an
24 immediately available alternative, but it has to be kept
25 alive for all kinds of good reasons, so that's a failure,

1 couldn't accomplish anything significant there, but it wasn't
2 for lack of trying.

3 And then we get to other real estate, and other real
4 estate -- it is reported everywhere that there's lots of real
5 estate that Detroit owns. Well, some of it Detroit owns;
6 some of it it's another governmental unit, some of which it's
7 kind of on the way there but not quite yet. There were steps
8 to look at some of that property. There's quite a lot and
9 maybe too much to look at in a micro level parcel by parcel,
10 but, in general, when people looked at property in Detroit,
11 there was a lot of it, which kind of meant there was too much
12 of it to attract interest because every other piece of
13 property is kind of going to be available to somebody else,
14 but at the end of the case -- and I'm referring to the
15 Syncora and FGIC settlements -- there was a drive to create
16 arrangements that, number one, deployed assets for the
17 benefit of creditors and -- but, number two, did so in a way
18 that if the creditors go forward and try to generate value
19 from those assets, that they're going to have to make
20 investments in the City of Detroit. And although Detroit
21 needs all of the relief it can get from this Court and the
22 confirmation order is incredibly important, incremental
23 investment in the city is exceptionally important as well.
24 The Syncora and FGIC transactions have, in this sense,
25 designed to be win-win transactions. You've heard extensive

1 testimony about that from Mr. Orr and Mr. Doak. So with
2 respect to this part, notwithstanding that on the law there
3 is no reasonable expectation by creditors that city assets
4 would be devoted to maximize creditor recoveries in this case
5 that actually happened, not necessarily to the extent that
6 every creditor would have wished, but it certainly happened
7 to a greater extent than is required by the law, and,
8 frankly, the -- looking back on it, I think it has to be said
9 that the manner in which the DIA assets were used to raise
10 funds for pension creditors and the manner in which other
11 assets were deployed to enhance recoveries for other
12 constituents in this case or reduced expenditures were, in
13 fact, very creative and aggressive and if there is any
14 obligation by a city to deploy its assets in order to win
15 confirmation of a plan of adjustment, this city did that.

16 Tax increases. There was overwhelming evidence not
17 just in the testimony before your Honor but, frankly, in the
18 eligibility hearing, in the initial presentation to creditors
19 from June 14th, 2003 (sic), that was also admitted into
20 evidence into this hearing, that it's not sensible for this
21 city to try to raise taxes. We're going to come at this in a
22 couple of different ways. I think let's talk a little bit
23 about the -- some of the basic things witnesses told you, and
24 then I want to apply that to some of the cases and some
25 things we know about municipalities. Several witnesses told

1 you that a review of the law would confirm that the city does
2 not have any legal ability to raise taxes itself, and one
3 witness, at least, told you that the Michigan legislature is
4 not likely to grant the city additional tax raising power,
5 and I think we all know that to be right, and so what we have
6 left when we have to consider raising taxes in the context --
7 there's two contexts here. There's going to be the context
8 of doing enough to meet the reasonable expectation of
9 creditors, and there will be the next context of what's the
10 out of Chapter 9 alternative. They're related but not
11 exactly the same. We now have to look at whether the city
12 should have deployed the Revised Judicature Act in some way
13 to raise property taxes, and we look at that because the
14 Revised Judicature Act is not subject to the tax limits.

15 Before we go on -- and this is slightly more
16 relevant for the out of Chapter 9 view, but I don't think we
17 can start talking about the Revised Judicature Act without
18 talking about what the Supreme Court has said about it, the
19 United States Supreme Court. They weren't talking about the
20 Michigan Revised Judicature Act. They were talking about --
21 I think it was the New Jersey equivalent in the Faitoute -- I
22 never know how to pronounce that case -- Iron and Steel case,
23 and the Supreme Court is reviewing creditor remedies. Of
24 course, the Supreme Court was approving a plan in that case
25 under a state rehabilitation statute, and it's reviewing

1 creditor alternatives outside of the case, and it talks about
2 the right to get a mandamus judgment against a municipality
3 to raise taxes. And here is what the Supreme Court thought
4 of that, called it, quote, "an empty right to litigate,"
5 close quote, and clearly put no value on it at all. There
6 are other cases -- and, again, this may be more relevant to
7 the next part, but it's the appropriate background when
8 talking about the Revised Judicature Act that talk about one
9 way to think about whether you should be using something like
10 the Revised Judicature Act to generate recoveries for
11 creditors is to compare the tax base of the relevant tax --
12 in this case, the property tax -- against the amount of debt
13 that you have to cover. In Detroit's case, the evidence
14 showed that the unsecured debt is greater than the aggregate
15 assessed value of the real property that's subject to
16 taxation. And, of course, as additional background, the
17 Mount Carbon case said it's fairly easy to establish that
18 municipalities in trouble shouldn't be raising their taxes,
19 but let's get more specific. In general terms, the cases
20 focus on two things. One is do the taxpayer, the tax base --
21 and sometimes it's easier to tell if you're dealing with a
22 small district -- we're dealing, of course, with a major
23 city -- lack the ability to pay increased taxes or won't do
24 so either because they will leave or just stay and not pay.
25 Sound familiar? If there are -- if this is the case, the

1 reductions in revenue by people driven out of the city or by
2 less compliance will offset any increased revenue, and,
3 frankly, the people departing the city are a bigger problem
4 because they're not there anymore to pay taxes at all. The
5 second issue is whether raising taxes is compatible with the
6 goal of saving the city. These are the downward spiral
7 cases, and, as I said before, because both of the two
8 different principles at the end of the day are about keeping
9 people where they are and paying taxes, they're kind of
10 related. They're sometimes stated as different standards,
11 but they're very closely related. And the reasoning behind
12 them, of course, is that if a city fails or if an irrigation
13 district fails or if any governmental unit fails or sees its
14 situation significantly worsen, it doesn't have revenue for
15 creditors or for anyone else, so this isn't just a standard
16 that's focusing on the welfare of the population. It was
17 developed to focus on the welfare of the creditors.

18 So what evidence does your Honor have before you
19 that raising taxes is not going to work? On the first point,
20 which is the kind basic saturation, you have current
21 delinquency levels, which were -- which are in the
22 presentation to creditors and was updated by Ms. Sallee's
23 testimony. You can also, your Honor, note the evidence that
24 talks about -- and, again, a lot of this is in the
25 presentation for creditors. I think it was echoed by other

1 witnesses. It was mentioning about the weakness of the tax
2 base in terms of income of residents, and you also saw that
3 indirectly in the litigation related to the water system and
4 the collection of water bills. It is a sad reality, but the
5 percentage of the population in poverty or close to poverty
6 in the Detroit area is high, and we have to recognize that as
7 a fundamental reality.

8 On the second point, again, reinforcing the first
9 because they're kind of -- they're kind of interrelated -- at
10 opening I focused on the language in Villages at Castle Rock
11 Metropolitan District Number 4. I only picked that case
12 because it's relatively recent compared to the others and
13 because it had particularly clear language, and I mentioned
14 that there are a bunch of others, you know, that are older.
15 And in addition to the Iron and Steel case, the Faitoute Iron
16 and Steel case, just a partial list -- I mean most
17 prominently I would guess is Corcoran Irrigation District 27,
18 which is 1939, Southern District of California; Drainage
19 District Number 7, Eastern District of Arkansas; Merced
20 Irrigation District, big California theme here; and Wolf
21 Creek Valley Metropolitan District, the last one being new,
22 that one being a 1992 case. And they're all the same. In
23 the case of Corcoran -- no. I think in the case of all of
24 them, they're all like Villages at Castle Rock in the sense
25 that they're all talking about perspective. They're all --

1 one of the reasons I wanted to talk about Castle Rock in
2 particular, it was perfectly clear that the existing tax
3 rates were not objectionable, at least as far as the
4 Bankruptcy Court was concerned, but that an increase was
5 going to cause a whole bunch of negative things to occur, all
6 things, frankly, that the record shows is already occurring
7 in Detroit. And I emphasized and I, frankly, think it has to
8 be the most important observation when comparing the decided
9 cases to this case, which is the issue in most of the
10 reported cases are should we raise taxes, will an increase in
11 taxes cause a series of bad consequences. And in the Detroit
12 case -- and I emphasize unfortunately, and I hope it's
13 improving, but not much yet, Detroit already shows -- already
14 exhibits all of the adverse consequences that the Bankruptcy
15 Courts in all these other cases would never visit on a
16 municipality and are deciding to avoid.

17 Now, if your Honor needs references to the record,
18 again, the presentation to creditors has a lot of the basic
19 statistical information, but you also got a lot of witness
20 testimony. You've got it from Mr. Hill. You've got
21 additional testimony I'm going to talk about in more
22 specifics from the mayor. You heard from Mr. Orr. And what
23 you heard from them and, frankly, other witnesses, which is
24 they are -- none of them believe that raising taxes is a good
25 idea. All believe that raising taxes would be a bad idea.

1 And they can do it based upon the current reality of the
2 ground. For them it's not fortune telling, trying to guess
3 the future without, you know, having the actual statistics at
4 hand.

5 Now, your Honor, some people talked about reliance
6 on experts for issues like this, and the answer to that,
7 frankly, is in the cases, and I think to a degree I'm
8 addressing your point about the Kelley case and about the
9 Fano case here, which is if you read all of the cases that
10 mention it, they mention reliance upon city officials for the
11 evidence that shows that raising taxes is not an appropriate
12 thing to do. I found no case -- I think I've read mostly all
13 of them -- where there's a reference to expert testimony as a
14 basis for a determination that the -- that taxes should not
15 be raised because a downward spiral is imminent. And
16 remember I think the Detroit case is actually easier to deal
17 with in a way, easier in a technical sense, not easier in a
18 spiritual sense, but because the facts are already here. The
19 downward spiral facts, unfortunately, are already here in the
20 City of Detroit. The issue is escaping them. It's, frankly,
21 easy to decide taxes should not be increased. In fact, the
22 issue is -- the harder question is should taxes be reduced,
23 and I know that there's a fair amount of debate about that.

24 Okay. I want to shift now and talk about what I
25 call the department store analogy, which is really about

1 competitiveness, which is really about the municipalities in
2 today's world are competitors with other municipalities.
3 It's in the news all the time. When -- I guess it was
4 Arizona, California, and Nevada was competing for the Tesla
5 battery plant, but it also is happening every day when people
6 decide where they're going to live. Yep, the size of the
7 house makes a difference, whether it's in good shape and the
8 lawn and all those other things, but it's also important,
9 what does the community offer and how much does it cost to
10 live there. And I will say that not involving the case in
11 Detroit because I think the Detroit facts are so advanced
12 that the existing reality demonstrates that taxes should not
13 be raised. The existing circumstances demonstrate that this
14 is a downward spiral case, unfortunately. I find the cases
15 that are trying to guess whether a downward spiral will
16 result from an increase in taxes to be slightly unsatisfying
17 because they generally, if you read them, talk about will it
18 happen or won't it happen, and then the judge decides, but
19 it's always occurred to me that there was a -- is a more
20 satisfying and more objective basis to go about answering
21 that question, and it's about what are other municipalities'
22 tax loads -- and you got to look at them, you know,
23 aggregated because of the overlapping jurisdiction problem --
24 and what are relative services because at the end of the day,
25 that's the best indicator of whether or not a municipality

1 can raise taxes without risking a downward spiral. Again,
2 for our case, this is somewhat, you know, academic, but I
3 would submit that the department store analogy to look at
4 competitiveness is the best and most objective window into
5 whether or not a tax raise would cause or worsen a downward
6 spiral. And I was sitting in the courtroom when Mayor Duggan
7 started talking about where he was in the process of
8 improving services, and he said he was only ten percent of
9 the way along where he thought the city needed to be, and
10 then he started talking about the fact that people are going
11 to compare us with what's going on in the suburbs, and our
12 taxes are higher. And I don't know if he said this on the
13 record, but -- and if he did, I -- didn't, I consent to
14 striking this in advance, you know. Another factor is is
15 that -- he worries about a lot is that auto insurance rates
16 are materially higher in Detroit than in surrounding areas,
17 and he regards that as an issue that has to go into this
18 calculus. But your Honor has -- in many places we have shown
19 you that Detroit's taxes are the highest of any city's in
20 Michigan, and in many places we have shown you and the record
21 has shown you that our services are not anywhere close to the
22 best in Michigan, far from it, unfortunately. Hopefully
23 we'll get there. And so applying the department store
24 analogy with facts that are found here also points to the
25 conclusion that tax raising is not sensible. It's not

1 reasonable. It will lead to worsened conditions as opposed
2 to better conditions. Regrettably, Detroit is already in a
3 downward spiral. It needs all the help it can to escape. We
4 shouldn't do anything to make it worse.

5 So to summarize with respect to this part, no one
6 should be surprised that the City of Detroit is not proposing
7 to raise taxes in order to raise additional money to pay
8 creditors or for any other purpose at this point in time,
9 and, moreover, as a matter of law, municipalities with
10 Detroit's characteristics shouldn't raise taxes to enhance
11 creditor recoveries or to do anything else because it would
12 make an existing situation worse. It's self-defeating
13 behavior.

14 So I'm now going to turn about measuring plan
15 recoveries against the alternative, which is dismissal, and
16 I've kind of -- well, first of all, we know that outside of
17 Chapter 9 asset sales -- creditors can't compel sales of
18 assets, period, end of story, so that part is easy. And as
19 to the next part, which is raising taxes or being visited
20 with raised taxes through judgments under the Revised
21 Judicature Act, on that topic I've kind of given away the
22 best parts of the argument. It is here that the Failoute --
23 excuse me -- the Faitoute Iron and Steel case speaks volumes
24 because, of course, the Court was there talking about what
25 creditors could be doing outside of Chapter 9 and found that

1 to be an empty right to litigate. It's amazing that the
2 Supreme Court has delved into that particular question for
3 us, but it has. I think all of the materials that we covered
4 concerning the current condition of Detroit, the problem with
5 its competitiveness, all indicate that if, notwithstanding
6 the city's best efforts, it wound up outside of Chapter 9
7 with all of the debts that it had, its situation would just
8 get worse and worse because you would have multiple lines of
9 additional taxes showing up on people's tax bills. We
10 already have a delinquency problem. It would get worse.
11 And, moreover, given the discrepancy in the size that the --
12 the amount of money that would be the subject of judgments as
13 compared to the size of the tax base, no one would come here
14 because they would look at -- they would look at the tax
15 assessments and say this is never going to end. This is
16 going to be a problem that's going to build on itself
17 forever, forever, forever. So to the extent that the city --
18 Ms. Sallee testified that the city experienced some increases
19 in property values lately, which is great, this would clearly
20 put an end to that, and not only would it discourage people
21 from coming, it would -- people who only had marginal value
22 in their existing problems would assuredly leave, so the idea
23 that somehow revenues could be generated through the Revised
24 Judicature Act outside of Chapter 9 is imaginary. It just
25 can't happen. It won't happen.

1 In addition, remember, Ms. Sallee had two different
2 projections for property tax revenues. She had the property
3 tax revenue without the RRIs, and then she had property tax
4 revenue with the RRIs. Well, the one without the RRIs is the
5 upper limits of what could be achieved because there would be
6 no RRIs in a non-Chapter 9 perspective. I know there was --
7 and an expert report never came. There was speculation that
8 somehow you could have the RRIs continue, but the truth is is
9 that the post-petition loan would default. Exit financing
10 would not be available, and here's the part about any form of
11 an effort to get the RRIs on a road outside of Chapter 9
12 would require some form of orderliness among the creditor
13 body and the ability to reach some form of consensus as to
14 how to proceed. And we have all the evidence we need to show
15 that that's unlikely, which is the preponderance of the
16 evidence finding. In fact, we have all the evidence we need
17 to know that that's never going to happen, coordinated action
18 by creditors outside Chapter 9. And the evidence I'm
19 referring to is, frankly, all of the foundation of your
20 Honor's ruling that it was impracticable for the city to
21 resolve its issues outside of Chapter 9, and, frankly, our
22 Chapter 9 case was in a way a living laboratory for what
23 would happen when debts weren't paid even with the automatic
24 stay. As I mentioned at the beginning, we had litigation
25 with everybody about something. Without the automatic stay,

1 we would have had all of those cases and many more, so the
2 hypothesis of orderliness, which was not easily achieved and
3 not immediately achieved even with the automatic stay, is a
4 thesis which is just not believable.

5 Again, just, you know, things to note in that
6 connection is there would be a priority fight outside of
7 Chapter 9, which we did not really have here. I mean it was
8 kind of in the background of some of the litigation. We
9 clearly would have had pensions asserting that the sum of
10 their funding provision and nonimpairment provision amounted
11 to a priority. We certainly -- and this is notwithstanding
12 the fact that, as a technical matter, the different liens
13 that -- excuse me -- the different property taxes under the
14 Judicature Act are supposed to be *pari passu*, but you would,
15 nevertheless, when not enough money comes in -- and not
16 enough money would come in -- you would have the retirees
17 asserting priority or something like it on the basis of their
18 special statutory positions. You would certainly have UTGO
19 creditors claiming that if taxes are not adequately paid,
20 what is collected would be allocated to them first. I don't
21 know if they would win. They absolutely would say so. They,
22 in so many words, effectively did when it became clear that
23 there actually hadn't been sufficient collections to make a
24 hundred percent of their payments in the prebankruptcy
25 scenario. We know that -- and we're going to come back to

1 this -- that the LTGO creditors asserted something called a
2 first budget item right, and this would go on and on. There
3 would be arguments that would have to be dealt with and dealt
4 with by a court. What this means to our remaining dissenting
5 classes, which have no arguments, or at least they haven't
6 heard arguments for this kind of priority, is that outside of
7 Chapter 9, there would not be a very good situation at all.

8 I want to finish up this area with the whole
9 discussion of the dismissal analysis. First, in addition to
10 the absence of any expert witness testimony in the cases or
11 any explicit reliance on expert witness testimony in the
12 cases, we looked around to see whether any reported case used
13 the word "dismissal analysis" and found that none did. We
14 also, of course, took a look at the statute, and we knew but
15 confirmed that the statute doesn't use the words "dismissal
16 analysis," and, of course, it doesn't. The dismissal
17 analysis was a term invented in this case, and, frankly, it's
18 not exactly what the statute points to anyway. The statute
19 points to the out of bankruptcy alternatives. It doesn't --
20 and shorthand, for better or for worse, it's referred to as
21 dismissal. I don't remember whether it actually got this
22 explicit in the testimony, but the reality is is that if
23 there is something called a dismissal analysis that the city
24 is required to produce in order to prove that the best
25 interest test is satisfied, we actually had one all along

1 because we've been evaluating what the out of bankruptcy
2 scenario looked like from the very beginning. It was, in
3 fact, in the proposal for creditors of June 14th, and it has
4 been updated -- I think Mr. Malhotra testified about this --
5 continuously during the Chapter 9 case, frankly, because we
6 knew it was a standard of reference. This is in -- the most
7 recent update is in Exhibit 782, and this is one of the few
8 things I want to project because I want to make sure we cover
9 the base thoroughly, so if we can put up 782 -- I think it's
10 page 6 -- on the screen. And I don't have a screen. Oh,
11 there it is. Okay. I didn't know I had a screen. Okay.
12 This, your Honor, is a thorough analysis of the financial
13 condition of the City of Detroit in the absence of a Chapter
14 9 case, including revenue assumptions that, quite frankly,
15 are optimistic because they are the same as the revenue
16 assumptions that we had -- that are projected for the other
17 cases, but it shows the growth of debt service and legacy
18 liabilities strangle the city at every point in time, and for
19 our purposes the only columns that are really worth looking
20 at are the years fiscal '15, which we are in right now, and
21 fiscal '16, which is the year after, and they are the last
22 two columns on the part that has been blown up for your
23 Honor. And, you know, there was a -- Mr. Kieselstein -- we
24 had a lot of discussions about opening doors in this case,
25 and Mr. Kieselstein opened the door to Latin. And as to

1 these two columns, I think the right expression is res ipsa
2 loquitur. They do speak for themselves. It is important to
3 note that the pension contribution lines, which, again, were
4 not in Chapter 9 in this hypothetical, so we're going to have
5 litigation as the city experienced in its past from its
6 pension funds. Maybe Mr. Gordon will get up and foreswear
7 litigation in an out of bankruptcy scenario, but I tend to
8 doubt it. But there would be litigation to compel the city
9 to pay those amounts out of cash relying on the nonimpairment
10 and the full funding provisions of the Michigan Constitution.
11 We are only in a position to have made the dramatic and
12 fairly immediate changes in health benefits because of the
13 protection of Chapter 9. It's inconceivable that that could
14 happen outside of Chapter 9 absent an agreement. And I'm
15 just focusing on those lines because I'm prepared to engage
16 in the assumption for these purposes because the numbers are
17 so overwhelming that the debt service, POC, and POC swaps
18 would have the -- and this is -- the debt service is the ones
19 that are not covered by the state, the state intercept
20 mechanism -- that all of those guys would get together and
21 make a deal on indefinite deferral, which it could be that
22 they would get that constructive that quickly, but that's not
23 what happened in our case. What happened is they litigated,
24 too, so there is -- what this demonstrates is, to go to the
25 technical issue, in addition to there being no real capacity

1 to use the Revised Judicature Act to increase taxes, there is
2 no excess cash that a judge could order the city to pay its
3 creditors, and so we rely on this work, again, which we've
4 always been doing, always been paying attention to, and just
5 never called it a dismissal analysis. And I, for the life of
6 me, don't know why we called it the steady state analysis,
7 but it is the best evidence -- the only evidence, I think,
8 that your Honor has seen about what an out of Chapter 9
9 situation looks like for the City of Detroit, shows no excess
10 cash, and as I said before, we don't think that there would
11 be any opportunity to raise taxes without destroying the
12 city, so for those reasons the plan is in the best interest
13 of creditors.

14 Next topic -- and we can take that down -- is
15 discrimination. An important point for us -- and I
16 understand that your Honor doesn't want to hear a lot about
17 it today, and, therefore, I won't discuss it very much -- is
18 that the city believes and we believe the city has shown that
19 there is no significant discrimination between pension
20 creditors, on the one hand, and other unsecured creditors, on
21 the other hand.

22 Just reviewing opening a little bit, the key, in our
23 view, is adopting a methodology for determining the
24 hypothetical allowable claims for pension claims that makes
25 them accurately comparable to the liquidation of bond claims

1 and other unsecured claims in a bankruptcy case. We have
2 clear rules that apply to the treatment of bond claims and
3 other general unsecured claims. We do not have clear
4 rules -- the cases are a little bit of a mess, and you've
5 seen that -- with respect to dealing with pension claims.
6 The example that I used at opening related specifically to
7 the COPs where I basically said one way to test whether
8 things are really comparable is to use the methodology that
9 some are proposing to use for determining pension claims and
10 apply them to the COPs and see what happens, and we saw what
11 would happen to the COPs claims is that they would be allowed
12 in an amount in the vicinity of 25 percent less, so even
13 though the COPs have settled, the point of the exercise is to
14 show that by using the investment return rates to discount
15 pension claims, you are generating noncomparable numbers, and
16 pension claims are being effectively understated. So one
17 very important point is that this view of the world or the
18 need to come up with comparability is completely separate
19 from and an important question even if your Honor decides
20 that outside of bankruptcy and for all of the purposes using
21 an investment return loaded rate for discounting pension
22 claims is perfectly okay. We, by the way, don't think that.
23 We think that the Dutch view and the -- and some of the
24 testimony you heard that indicates that using an investment
25 return assumption to discount pension obligations has a

1 tendency to understate pension claims for many purposes is
2 probably right, but you don't even have to decide that to
3 decide that for purposes of determining whether or not there
4 is significant discrimination and significant enough
5 discrimination to require a rebutting factor or how much
6 rebuttal is necessary. You can just look at the fact that
7 the investment return approach just generates a result that
8 isn't really comparable with the clear statutory result that
9 applies in other contexts. And as I said at opening, there
10 are a number of choices that your Honor has. There's the
11 U.S. Air approach, there is to just look at a straight risk
12 free approach, and there is to look at the COLA as an
13 interest factor and just kind of treat pension claims like a
14 bond, which is just treat the pension claims as principal,
15 the COLA as interest, and just add up the principal.

16 Now, I think that there is in the record more than
17 enough information if your Honor wanted to make a pinpoint,
18 this is my allowance number. The issue of methodology of
19 allowance is a legal issue, and if your Honor decides that
20 you have a particular approach to the issue of determining
21 the denominator for purpose of determining pension claims but
22 you don't know that we have exactly the right number in the
23 record, we'll take your legal ruling, and we'll give you the
24 number. Many times in bankruptcy cases that is a way to fill
25 in the record if it's necessary. I suspect the numbers that

1 every permutation that your Honor might be interested in is
2 supported by the record, but if there is a permutation that
3 you believe is appropriate as a matter of law, we will supply
4 it. But in any event, the demonstratives that I used at
5 opening, which I'm not going to repeat here, showed what
6 happens when you make adjustments to the denominator to try
7 to get a more comparable view of the aggregate pension claim
8 and something that's comparable to our bankruptcy mandated --
9 Bankruptcy Code mandated method of liquidating other claims,
10 and it's definitely an important step in the process.

11 There was two other really small, but they did
12 attract a significant amount of discussion, argument about
13 the denominator, and there were two of those. One was the
14 vested, nonvested issue, and I think it was clear -- I think
15 I said this at opening, but -- and it may have even come out
16 in some of the testimony. Vested is a concept that talks
17 about what an employee keeps if an employee decides to leave.
18 That's what a vested benefit is. You can leave, and you
19 still get it. But if an employee is terminated by the
20 employer breaching contract for any reason or for no reason,
21 the employee's claim isn't limited to his vested benefits.
22 The employee's claim is the employee's expectancy, which --
23 and there are cases which show that that claim can include an
24 expectancy with respect to pension, an expectancy with
25 respect to healthcare, and an expectancy in the case of

1 pensions that if you're going to advance in salary either
2 because it's going to go up in your current position or
3 you're going to go into higher positions, that's part of your
4 damages, too. You find all that in the wrongful termination
5 law. So in a bankruptcy case where the result of a city not
6 making pension obligations is a breach of a contract, the
7 measure of the claim that you should be looking to is, well,
8 what would happen in the context of a city breach, not what
9 would happen if an employee voluntarily decided to leave, and
10 so the city's numbers has not made a distinction between
11 vested and unvested benefits. The city has used accrued
12 benefits, accrued, which may or may not be exactly identical
13 to all of the elements that an employee would be entitled to
14 in a termination case, but accrued which more closely
15 approximates what the city thinks the contractual entitlement
16 of an employee really is. Our numbers have always been that
17 way. They've been criticized as not extracting nonvested.
18 We think they're perfectly appropriately included, again, in
19 a claim environment where it's the city breaching.

20 And the second argument that was made kind of at the
21 edges was the frozen, not frozen argument, which is this --
22 which is because this plan was -- may have been or will be --
23 essentially not yet, you know, will be, quote, unquote,
24 frozen for accounting purposes, we should use frozen pension
25 math as opposed to unfrozen pension math, and, frankly, I

1 don't think we're using either. I think the whole issue of
2 what is the appropriate accounting of liabilities in a frozen
3 plan has nothing to do with the expectancy or nothing to do
4 with the claim that arises as a result of freezing. The
5 claim that arises as a result of freezing if it's not, you
6 know, addressed in some other way is accrued benefits, not,
7 again, what the accounting convention says is left to be
8 dealt with in a frozen plan. So for both of those, we
9 dismiss both of those criticisms -- your Honor should as
10 well -- and use the accrued numbers as the basis.

11 Okay. I do want to spend, though, a couple of
12 minutes on the whole issue of what is the right rate of
13 return assumption in the event that your Honor decides that
14 it's the appropriate place to use for discounting pension
15 benefits but also because we believe that it was a prudent
16 approach to resolving the pension claims and did not result
17 in giving pensions more money because it was unreasonably
18 low. As we demonstrated in the evidence -- and Mr. --
19 Milliman's Mr. Perry I think was the -- I would regard as the
20 primary witness for this particular view, although, frankly,
21 the testimony came out in much of the actuarial testimony,
22 which I know is everybody's favorite -- the view is is that
23 there is a risk -- Mr. Perry's view -- the word he used, and
24 I wrote it down a number of different places, and I made sure
25 I wasn't going to forget it -- that the rate of return

1 assumption was viewed as a risk budget, which seemed to be a
2 very, very apt way to put it is that you're basically -- what
3 a municipality is always doing when it makes a rate of return
4 assumption and the municipality is on the hook to pay the
5 benefits whether or not the rate of return is achieved, the
6 amount that it sets as its anticipated rate of return is how
7 much risk it's ultimately taking. It exactly describes that
8 number. It exactly describes the effect of that number. So
9 if the city had recalibrated benefits, I mean -- and by the
10 way, if the city was going to make a seven-percent rate of
11 return assumption instead of a 6.75-percent rate of return
12 assumption, the employees would want more, and the city would
13 be effectively guaranteeing that seven percent would be
14 earned. Same thing happens at 7.9. Same thing happens, you
15 know, at 8.0. And while the city is negotiated -- excuse
16 me -- insulated -- sorry about that -- insulated from risk of
17 higher pension claims for the first nine years, from year ten
18 and on out it has to pay the piper, so if the number is
19 missed during the first nine years, the first nine-year cash
20 flow is protected. In year ten it's got to start paying.
21 How much will be dependent upon the smoothing assumption or
22 how long it gives itself -- smoothing is for assets, but it's
23 a different kind of smoothing. It's the amount of time it
24 has to amortize the difference, but it's all there. It's all
25 on the city. And to me, again, we could point to lots of --

1 THE COURT: That's projected to be a big number.

2 MR. BENNETT: Pardon?

3 THE COURT: That's projected to be a big number.

4 MR. BENNETT: It's projected to be a big number
5 anyway because you're not targeting a hundred percent funding
6 at that point. You're targeting 75-percent funding in the
7 case of PFRS and 70 percent says GRS, so, yes, it's a big
8 number, and it's got an amortization assumption in it, and
9 the projections make it.

10 So should the city be higher? I mean to me the best
11 evidence or the -- that's a loaded term. The most persuasive
12 evidence that 6.75 is quite high enough, thank you, and it
13 should not be any higher was the testimony with respect to
14 the asset volatility ratio that is applicable to pension
15 funds. PFRS is ten. GRS is 15. And, of course, the reason
16 why these are very, very high numbers -- this was actually
17 the first time ever in court testimony someone under oath
18 said, yes, they're off the chart, and they were. They were
19 way off the chart. The sample that was -- for which this
20 ratio was calculated in the reports that the experts were
21 using cut off long before ten and long before fifteen, and
22 the reason that Detroit gets there is because it's working
23 workforce is so much smaller than its retired workforce.
24 That's the -- at the end of the day, that's the most powerful
25 reason why that ratio is so out of whack, and it basically

1 says when you're in that condition, your organization size
2 just isn't enough to keep up with the volatility, and so is
3 there any surprise that a financially distressed city in a
4 downward spiral that has as asset volatility ratio of
5 somewhere between ten and fifteen -- I'm not saying that
6 average is the right way to look at it, but just those are
7 the two numbers that we have -- should be at the low end of
8 the risk budget/assumed investment rate of return. Even if
9 we're at the low end and everybody else is right, we should
10 be at the low end. There was ample testimony, I thought,
11 taken on the general question of whether anyone should still
12 be at eight given the testimony that it's basically a 15-
13 year-old convention and that the world has changed somewhat
14 within 15 years, but I think that enough is what I'm going to
15 focus on as being the -- kind of the most compelling reasons
16 why 6.75 is the right number.

17 Other points that your Honor might refer to and look
18 at is Mr. Perry's testimony concerning the work recently done
19 at Milliman, which took down inflation assumptions. Frankly,
20 inflation has been low for many years. They've taken them
21 down. Other people have not. There was much testimony on
22 that. It seems that the Milliman approach is reasonable.
23 And he also explained that they've recently backed off the
24 return assumptions with respect to equities and alternative
25 investments again reflecting what they think are relatively

1 recent experience. And, finally, again, a very good way to
2 look at this that encapsulates many factors, Mr. Perry talked
3 about what is the percent likelihood that the plans would
4 actually hit the 6.75-percent assumed rate of return in --
5 for the ten-year period he pegged it at 52 percent. There's
6 a lot of false precision in that number because there's a lot
7 of different assumptions that total up to that, but that
8 looks like a preponderance of the evidence kind of number.
9 That 6.75 percent is a little bit more likely than not to be
10 hit. And then it gets better after the ten-year period.
11 That was in the ten-year period. Within the thirty-year
12 period it came -- it started drifting up to 60, so it is
13 certainly not the case that 6.75-percent is high. Clearly it
14 was a negotiated number. No one said anything different than
15 that. It was a little bit uncomfortable to hear negotiation
16 turned into a dirty word with respect to this issue, but,
17 frankly, it was a key parameter in resolving the pension
18 differences, and, of course, it was effectively negotiated.

19 Last part with respect to this issue is some of the
20 efforts that were used to justify continuing with the 7.9
21 percent, and this methodology or this approach was used not
22 only by the FGIC witness but by opposing counsel in cross-
23 examining the witnesses of the city, and this is to have a
24 discussion about the number of years that the pension funds
25 have done better than 7.9 and the number of years that

1 pensions did less well than 7.9. I hope it wasn't too
2 subtle, but Mr. Miller asked some questions of the FGIC
3 witness about what happens if a pension fund is up ten in one
4 year and down ten the next and then reversal, and we showed
5 that -- through the testimony of the FGIC witness that in
6 both instances you've lost money, which shows how meaningless
7 it is to take a look at whether a particular pension fund is
8 higher or lower than any particular number in any particular
9 year. The only measure that makes sense is compound annual
10 rate of return and that you have to go back 25 years -- and
11 if you remember the exhibit -- I don't remember the exhibit
12 number, so I can't put it up, but the exhibit that was -- the
13 FGIC witness put up that he had 25 years of GRS experience
14 and only 15 years of PFRS experience, and then, of course, he
15 picked up the first ten years of GRS experience to fill in
16 the data that was missing for PFRS. The only reason your 7.9
17 percent works on a compound annual basis with respect to the
18 25 years is that the first three years were outrageously
19 good. There were two 20-plus years way back 25 years ago.
20 So when you're in a world where your 7.9 number on the only
21 measure that matters, cumulative rate of return, is -- you
22 can only meet it by looking at 25 years of experience that
23 every shorter period you're not there, time to reassess, and
24 that's exactly what the city did. The use of the how many
25 years greater or less than 70.9 was very disingenuous and

1 dead wrong.

2 Okay. We're now going to move to the part that your
3 Honor wanted me to focus on, which is the -- which is the --
4 oh, I'm going to skip over it but just note that there were
5 arguments made that the assets were -- that the numerator
6 that the city used, which your Honor has the numbers for the
7 value of the different components, was understated; that the
8 assets were understated. I explained during opening the
9 basis for all of the asset inclusion and the county's
10 methodology. We think the evidence indicated that the
11 county's approach -- city's approach to it -- sorry -- is
12 exactly right.

13 Okay. And that includes, by the way, the fact that
14 we exclude the state settlement for the reason that was
15 indicated in our discussion of the Bryson Properties case
16 that this was a situation where there was a claim against the
17 state, and the state has made a settlement, and that's the
18 reason for the distinction. And I think that does away with
19 the, you know, kind of under the plan standard for including
20 amounts. It's why the payments are made that is the relevant
21 criteria, not that they are made under the plan or pursuant
22 to a term in the plan.

23 THE COURT: All right. So what is the city's
24 position on what the percentage payment is in Classes 10 and
25 11?

1 MR. BENNETT: If I could get the demonstratives from
2 opening -- can you get the charts? Oh, better yet the
3 summary chart. Is this a summary chart or -- yes. This is a
4 summary chart. Oh, no. This is just -- I'm sorry. This is
5 just PBGC. This is a PBGC chart. We had three of them, and
6 there you have the -- this one is the PBGC rates there at the
7 bottom. There's the recovery elements at the values we put
8 them in at, and there's the ones below it are excluded.

9 And then if you go to -- the next chart would be
10 risk free rates, and then the last chart is the stripping out
11 COLA, treating COLA as an interest rate and just treating
12 pension claims as principal amounts. Oh, wait a minute.
13 This is not the right chart. The numbers are missing. Do
14 you have the final one with the -- okay. I will get that for
15 you at the break. I have it in my briefcase. I'll get you
16 these numbers. This was an early draft of the chart without
17 the --

18 THE COURT: So you're telling me that the percentage
19 recovery for these two classes in the city's position is
20 what, in this range? It's not a specific amount?

21 MR. BENNETT: It's in this range. Well, there's
22 specific -- well, your Honor --

23 THE COURT: You're not willing to be pinned down on
24 specific numbers like you are with the other classes?

25 MR. BENNETT: Your Honor, I would live with any --

1 any of these methodologies I think are -- generate a better
2 approximation of comparability versus the general unsecured
3 claims and bond claims in the case. I would probably -- if I
4 get to write the opinion, I would pick the PBGC rate on the
5 basis of the U.S. Air decision. Oh, there we have it.
6 There's the no discount slide.

7 THE COURT: All right. We need to pause here. I'm
8 thinking about what a retiree is promised here; right?

9 MR. BENNETT: Um-hmm.

10 THE COURT: On the PFRS side, it's no reduction in
11 retirement benefits -- in pension amount and a 50-percent
12 reduction in the COLA; right?

13 MR. BENNETT: Right.

14 THE COURT: And a four and -- on the GRS side, a
15 four-and-a-half-percent reduction in the pension amount and a
16 50-percent reduction in COLA; right?

17 MR. BENNETT: Well, no. Actually, let me stop you
18 there. To get to the four and a half percent reduction,
19 that -- you get to that number because of the ASF
20 reallocation, and, frankly, we don't think the ASF allocation
21 is part of the distribution, so we -- I agree with your Honor
22 that with respect to the pension claim of a pension person
23 who has no ASF issue --

24 THE COURT: Okay.

25 MR. BENNETT: -- that's the right number. People

1 who do have an ASF issue have a higher number, but within
2 even the 90 -- the 95.5-percent amount, some of that isn't
3 recovery from the city. Some of that is effectively the --
4 you know, the ASF reallocation, and so that's one of the
5 reason why a -- when you look at it from the perspective of
6 what is a pension person getting versus the monthly pension
7 check, that is one result, but it's different partly because
8 of the ASF issue, partly because of the fact that COLA grows,
9 and then here's another reason is that remember everybody is
10 discounting everything to the petition date, and then after
11 the effective date everybody earns interest, so the math
12 actually gets a little bit tricky here. In the case of a
13 bondholder, a bondholder -- let's say we take a bondholder.
14 Their claim is a hundred.

15 THE COURT: All right. But pause there. In the
16 balance of my obviously simplistic analysis, I see the UAAL
17 graph, chart --

18 MR. BENNETT: Um-hmm.

19 THE COURT: -- that you all produced that shows that
20 although for the first ten years it's either level or sinks
21 slightly in the case of one of the plans --

22 MR. BENNETT: PFRS.

23 THE COURT: -- yeah -- but then, according to your
24 projections, does get to a hundred percent --

25 MR. BENNETT: That's right, but now --

1 THE COURT: -- for full funding.

2 MR. BENNETT: Okay. Let's now -- just bear with me
3 a second.

4 THE COURT: Bear with me.

5 MR. BENNETT: Okay.

6 THE COURT: And you were about to answer my
7 question. What are the factors that suggest that that
8 recovery for unfair discrimination purposes, which is what
9 we're talking about here, is not a hundred percent?

10 MR. BENNETT: Okay. When you have a -- to just go
11 back to the bond example because we keep coming to the one
12 where we have a clear rule -- all right -- if we -- let's
13 talk about a hundred dollar bond, five-percent interest rate.
14 Okay. When we get to a Bankruptcy Court, the claim is a
15 hundred. Anyone walks in and says it's 101 or 99 gets
16 laughed out the door. Okay. We go through the case. It's
17 possible that that is a 75-cent claim; right? Let's just say
18 hypothetically that it is. But on the effective date, if you
19 give that person another debt instrument of 75 cents, it's
20 going to have an interest rate. It's entirely possible on
21 that math, the 75-cent bond with an interest rate, that
22 they're going to get to a hundred, too, if you just look at
23 cash flow. And for looking at cash flow, which is what we're
24 doing with pension holders because pension holders focus on
25 cash flow, is we're looking at -- number one, we're trying to

1 get to a situation where I'm turning a pension person who's
2 got a very different claim to look like a bondholder to
3 figure out what their petition date claim really is, to give
4 it a distribution on the effective date that has the same
5 meaning, too. Remember, COPs are getting B notes, interest
6 at four percent becoming six percent, not 75 cents, of
7 course, but they're -- and they're getting C notes that also
8 have interest factors attached to them. So when making the
9 math comparable and understanding that the effective date
10 distribution isn't that number way out on your curve where it
11 gets to a hundred, it's something else, when you make those
12 comparable -- when you really think comparably about all of
13 these things, you get to these numbers, numbers on these
14 three charts. It's a hard thing to do, and that -- and it's
15 not a focus on, oh, ultimately they're going to get enough
16 money so that they're going to get par. Well, right.
17 Ultimately a lot of creditors that don't get par recoveries
18 get enough money to get to par, but that's not the relevant
19 test. The relevant test is the allowed claim on the petition
20 date against the value distribution on the effective date,
21 what it's worth on the effective date, so now let's talk
22 about that. What is it worth on the effective date? Some
23 elements ought to be discounted at 6.75 because the person
24 making the distribution, the DIA and the pension funds, they
25 have the right to pay 6.75-percent discounted numbers to

1 discharge their obligation. They can do it at any time, and
2 it's their right, so the correct discount rate, even though
3 on your chart that shows it getting paid in full
4 ultimately -- there's 466 million in payments -- the reality
5 is you can't value them at 466 million because the person
6 paying them has the right to discount at any moment at 6.75
7 percent.

8 You also talked about the county promises beyond
9 year ten, very big numbers. Do county promises --

10 THE COURT: Well, but if the DIA does that, the
11 pension fund will have the cash to invest --

12 MR. BENNETT: True.

13 THE COURT: -- and earn that presumptively.

14 MR. BENNETT: I agree, and so you --

15 THE COURT: So isn't it six of one --

16 MR. BENNETT: I don't know. My own personal view is
17 is that you -- that the investment return assumption is an
18 assumption that may or may not be achieved. The
19 distributions that we know are coming out of certain sources,
20 they have a different character, and so I'm focusing on the
21 character of the distributions, and, yes, there is an
22 investment return assumption that ultimately the city stands
23 behind, but let's get to that in a second because the
24 investment return is something the city stands behind. I
25 think it's appropriate to look at it. One, it's ten years

1 from now because that's when the city has to make good on the
2 6.75 percent, and we then ask ourselves what's the city
3 promise in year ten worth today. The City of Detroit's
4 promise ten years from now today is not zero discount rate.
5 It has a discount rate, too. I think we used the five. Some
6 of the testimony -- I don't quite know if it got -- it was
7 coming because it was in the expert reports -- was that that
8 number should be a nine, and, of course, if you take a look
9 at the B note structure, it's four in the early years and six
10 in the later years. So, again, for a pension person, they
11 don't care about this math. They want to know relative to
12 their pension check what are they going to get, and that's
13 what the disclosure statement told them. But if we're in the
14 world of comparing the pension distributions to a bondholder
15 distribution, we have more advance math that we have to do,
16 and it's for that reason -- it's when you do the more
17 advanced math when you look at things the same way, not
18 different ways, again, for comparison purposes, sure, you can
19 make the pension claims look really, really great if you
20 decide that the city promise ten years from now is money good
21 and not subject to a discount rate. It does wonders if you
22 want to look at it that way, but that's not the way the
23 bondholders look at their distributions. You have to look at
24 them the same way.

25 THE COURT: Wouldn't it be the right thing to do to

1 look at the stream of payments that a retiree is entitled to
2 outside of bankruptcy with the same eye?

3 MR. BENNETT: Meaning for purposes of like
4 accounting purposes or --

5 THE COURT: For purposes of valuing the claim.

6 MR. BENNETT: Well, and you heard outside of
7 bankruptcy right now it's all done -- the convention people
8 like is because of the use of the investment return
9 assumption to discount them, which, again, I think the most
10 compelling reason why that's wrong is that it's implicitly
11 shifting the rate of return risk to the employee.

12 THE COURT: Right. I get that.

13 MR. BENNETT: It's U.S. Air point. But also it's --
14 I guess it's harmless if you're prepared to believe that the
15 investment return assumption will be realized, period, but
16 you heard the testimony of Bowen that the 6.75 percent has a
17 52-percent chance of being realized in the first ten years.

18 THE COURT: Well, but you don't want to argue that
19 your plan isn't feasible.

20 MR. BENNETT: No. I'm going to get there. It's
21 feasible, and, by the way, on the 52 percent growing to 60
22 percent and on the more likely than not standard, which has
23 been the standard forever in feasibility in bankruptcy cases,
24 it's feasible. And I don't think anyone from the city has
25 ever stood up to you and said that it would be worse if it

1 was at 6.5. As you know, the city started out lower, so it
2 made a deal, and I'm going to make a -- I'm going to
3 accelerate another point because it kind of applies here,
4 too. Ms. Kopacz has said that -- and I used the word
5 already -- that the projections are skinny, okay, that that's
6 how it came out. And in a number of ways, the 6.75 percent
7 may look skinny because of the probabilities. Your Honor, we
8 have a consensual plan, a broadly consensual plan. How would
9 you ever expect it not to be skinny? When people negotiate
10 over reorganization plans where you ultimately wind up in the
11 best of circumstances -- and we think we're in the best of
12 circumstances in Detroit -- is that every party gets exactly
13 what they need, not a penny more. That's how these things
14 have a tendency to work. So what are the chances that you
15 could have a negotiation by very spirited adversaries over
16 huge amounts of money, no one wanting to leave an extra
17 nickel on the table, where the city winds up exiting the
18 case --

19 THE COURT: Well, of course you're right as far as
20 you go, but that assumes the negotiated result is the best
21 result, but, look, I want to get back to the -- I want to get
22 back to the math question because --

23 MR. BENNETT: Okay.

24 THE COURT: -- the question I asked is unanswerable.
25 To me the pension claims are a debt just like any other.

1 Could be bonds, you know, could be notes. It could be
2 anything; right? And here you've got professionals -- we
3 call them actuaries, but they might be accountants -- which
4 says the city has this obligation, but the assets on hand to
5 pay that obligation are short by \$3.5 billion or whatever the
6 number is.

7 MR. BENNETT: Um-hmm.

8 THE COURT: Now, in the pension context, we call
9 that UAAL, but it -- you know, you'd call it something else
10 in a different context. And now the city comes up with a
11 plan, which it argues is feasible and which, you know, we'll
12 have to decide if it is, but if it is, the UAAL goes away.
13 Now, tell me why that isn't a 100-percent recovery.

14 MR. BENNETT: Your Honor, if it is realized, it is a
15 hundred percent recovery.

16 THE COURT: You tell me it's --

17 MR. BENNETT: By the way --

18 THE COURT: You tell me it's going to be realized --

19 MR. BENNETT: Excuse me.

20 THE COURT: -- because you've got the feasibility
21 thing.

22 MR. BENNETT: Let's back up a second.

23 THE COURT: Okay.

24 MR. BENNETT: First of all, the UAAL that is going
25 to be realized is the UAAL discounted to -- it takes out the

1 4.5 percent, takes out the COLA, the --

2 THE COURT: I'm not talking about this case.

3 MR. BENNETT: Oh, okay.

4 THE COURT: I'm talking about --

5 MR. BENNETT: All right. Your Honor, I --

6 THE COURT: -- some hypothetical debt which the city
7 has --

8 MR. BENNETT: Okay.

9 THE COURT: -- which the accountants say you need
10 \$3.5 billion more somewhere to pay this debt, and the plan
11 has got that money there. Why isn't that a hundred percent
12 recovery --

13 MR. BENNETT: Okay. Because --

14 THE COURT: -- because you're telling me it's not.

15 MR. BENNETT: Because -- it isn't because the -- if
16 the UAAL is satisfied on the effective date with cash, it's a
17 hundred-cent recovery. If the UAAL is satisfied over time
18 without interest, it is not a hundred-cent recovery under the
19 math that matters, which is the bond math. If you --

20 THE COURT: Well, but how can that be if every --
21 I'm going to use the word "claim holder," not "pension
22 holder," because I'm talking about a hypothetical here -- is
23 paid exactly what they are owed until during the time,
24 whatever the time is, for the unfunded piece of it to be
25 paid?

1 MR. BENNETT: Because you've excluded -- and, again,
2 you want to say that because this has now been a plan and
3 it's being confirmed that they're going to get all those
4 payments when they get them, but there is risk of nonpayment
5 that in our world we compensate or measure with interest, and
6 so it's the difference between on the effective date paying
7 hundred-cent dollars cash or having the United States
8 Treasury step in and cover the pensions on day one. Then
9 there's no collection risk anymore, and the deferral -- the
10 deferral in the obligation is exactly equal to the deferral
11 in the money, but that's not what's happening here. What's
12 happening is --

13 THE COURT: Okay. So your argument to use some kind
14 of discount, whether it's -- whichever one of these three it
15 is, we're talking about this -- are we only talking about
16 this in the context of measuring recovery for unfair
17 discrimination?

18 MR. BENNETT: Correct. What I need to do because of
19 the way the Code works is apply blind --

20 THE COURT: We're not talking about using this for
21 purposes of advising these creditors what their distribution
22 will be.

23 MR. BENNETT: Exactly. I'm not. What I'm doing is
24 I'm -- there's actually huge amounts of debate over whether
25 the bankruptcy allowance scheme for bonds makes sense or not,

1 and, of course, the market has tried to opt out of it with
2 may call provisions and the like, so -- but for better or for
3 worse, I'm stuck with bond math or bond math as imposed by
4 Bankruptcy Code, Section 502(b)(2), which is where the
5 problem is. I have to use that math when I -- when the COPs
6 came along, when LTGOs came along, when UTGOs came along.
7 I'm stuck with it, all right, whether it has perfect merits
8 or not, and bondholders would tell you it doesn't. All I'm
9 trying to do is use the same math to something that is
10 different, and what we tried to do -- and, frankly, the U.S.
11 Air court did a good job of it. It was not concerned about
12 the distribution side because it was a PBG insured deal. I
13 don't have that luxury, so I had to do something with respect
14 to the asset side that made similar sense. And so I've
15 looked at the distributions to the pensions the way a
16 bondholder would look at the distribution to a bond. That's
17 all I did is apply their rules, apply bond rules to pensions
18 so that the math would be consistent.

19 THE COURT: And your position is that when you do
20 that --

21 MR. BENNETT: Let's go back to --

22 THE COURT: -- you get these really low percentages.

23 MR. BENNETT: You get modest percentages.

24 THE COURT: Really low percentages.

25 MR. BENNETT: Yes.

1 THE COURT: Okay. Let me ask you to move on.

2 MR. BENNETT: Okay. So --

3 THE COURT: You need to talk about the legal
4 standards for unfair discrimination.

5 MR. BENNETT: Okay. I want to, first of all, kind
6 of pick up one of the controversies that I think was in the
7 opening statements from the different creditors, and this
8 related to when you talk about the -- when you evaluate
9 discrimination, is it a subjective test or an objective test,
10 and I think that, frankly, the Code answers that question.
11 It's about whether the plan is unfairly discriminated --
12 discriminating, not whether a particular individual had a
13 thought about why a particular distribution was the way it
14 is. This is an objective test, not a -- you don't go around
15 and figure out every single person who had something to do
16 with a deal and find out why they supported one particular
17 number or another. That's not surprising, by the way,
18 because I think that it will turn out that everybody has got
19 different reasons, particularly when a compromise is made, as
20 to why they talk themselves into a particular compromise.
21 That's not what this is about. What this is about is
22 objectively, what are the objective circumstances as
23 demonstrated by the evidence that would justify a difference,
24 not what was in an individual person's mind.

25 We have said that the primary justification for a

1 difference in treatment between pension claims and other
2 unsecured claims is because the pension claims are, open
3 paren one, held by actives as well as by retirees, although
4 the actives are clearly the minority, and, secondly, that
5 actives pay attention to what's happening to retirees for two
6 reasons: one, they'll be retirees someday, too, and,
7 secondly, as a reflection of how their employer is treating
8 people. We think all of these things are supported by common
9 sense. It's just the way the world is. Everyone who has a
10 job and who has a coworker that sits next to them is going to
11 look at what's happening to that coworker as a reflection of
12 what might happen to them in the future.

13 Now, there was lots of testimony on this, and I'm
14 only going to read a few and a few parts from certain
15 witnesses. Mr. Bloom actually was eloquent on this point,
16 and I lost the question, but let me just give you his
17 testimony. "I think I observed it in two different ways, one
18 direct and one indirect. The direct way is that there were
19 members of our committee who were active -- one was an active
20 employee and one was a representative of active employees.
21 And in both those cases, I heard them say to me directly that
22 they were -- that the active employees did care about how
23 retirees were treated, and that was relevant to them in their
24 view of what was right and what should happen in the case.
25 And second was while, again, I was not involved in the

1 collective bargaining negotiation itself -- excuse me --
2 other members of our committee were regularly in touch with
3 other active workers who they knew -- as I said, family
4 relations, et cetera -- and they also -- and they also
5 reported the same thing." In an answer to a different
6 question, "We talked a lot. And it was the committee's
7 brief -- belief" -- sorry -- "that the active employees were
8 concerned, and we had active employees who were putting that
9 forward as a concern." The other witness who talked most
10 eloquently about this was Mayor Duggan.

11 "Question: Do you have an impression or a
12 judgment as to whether the way pensioners are
13 treated has an impact on the city's dealings with
14 its current employees?

15 Answer: There's no question that the morale of
16 the employees that I interact with at least got
17 better when the cuts were reduced and ultimately the
18 hybrid plan came out which apparently expectations
19 had been lowered so far, I think people had a pretty
20 bleak outlook, but in my interaction with them,
21 people feel better than they did six months ago."

22 He went on or flops over to -- oh, it's a different
23 question, but I've lost the question on this one.

24 "You know, city government is its employees.
25 They're the ones who deliver the service, and

1 they're interacting with the public every day. You
2 try to motivate them with pay and incentives and
3 supervision, but nothing motivates them better than
4 feeling good about their job, and so there's no
5 question that people who feel like they're being
6 treated fairly tend to do a better job than people
7 who are treated unfairly. I think that's probably
8 true everywhere."

9 Ms. Jones, city council president, and several
10 questions of foundation, and then she's asked,

11 "What was that impact?"

12 Well, when you work a job and you look forward
13 to retiring, you look forward to the dollars that
14 you will have to care for yourself and your family,
15 and to know your pensions will be drastically cut
16 and the money that you expected to receive you will
17 not be receiving, that definitely has an effect on
18 you.

19 Affect your morale?

20 It can, yes."

21 And then Kevyn Orr testified about many people he
22 runs into in talking about the -- in talking about voting on
23 the plan.

24 "Many people that are making these votes are
25 active employees that we're trying to incentivize to

1 perform some of the RRI's that we're building into
2 the plan. It's important that there be a consensual
3 resolution having recognized that the city had a
4 long history with negotiations and resolutions that
5 there be buy-in."

6 There are more, but I don't want to spend too much
7 additional time on it. I do think that the point does make
8 common sense. As I pointed out at opening, in the Aztec case
9 itself, the case that, you know, gives its name to a test
10 that most courts use, it talks about discrimination being
11 permitted when, and then it kind of asks a question, and the
12 quote, "Does the proposed discrimination protect the
13 relationship with specific creditors that the debtor needs to
14 reorganize successfully?" It couldn't be more on point than
15 that.

16 There's another business aspect to this, though,
17 which actually during the case got a little bit stronger. As
18 your Honor knows, that the retiree settlement also included
19 settling the appeal of your Honor's ruling on the impairment
20 of pensions in Chapter 9, and, as I said before, I agree with
21 that ruling. Judge Klein agrees with that ruling. But the
22 Sixth Circuit hasn't ruled. One of the things that happened
23 while we were in this case is that Jefferson County was
24 confirmed and then went up on appeal. And I don't know if
25 your Honor saw the opinion, but it roughly -- I think it's

1 two or three weeks ago, but it maybe is a month. The
2 District Court in the Jefferson County case wrote an opinion
3 which creates, I think, what to me looks like, although I'm
4 not as up to the law in this area as maybe I should be, the
5 first time equitable mootness -- the equitable mootness
6 doctrine is being limited when a constitutional issue is on
7 appeal.

8 THE COURT: I did see it.

9 MR. BENNETT: So this, I think -- before that --
10 this deal got done before that opinion came out, but one of
11 the reasons for making a settlement and one of the reasons
12 for discrimination was that this particular group of
13 creditors had an appellate argument, an opportunity to
14 reargue with de novo review a legal issue that at least when
15 your Honor made a ruling was fairly unsettled in the law;
16 that other courts had kind of touched on it at the edges and
17 had decided analogous questions that really should be
18 answered the same way, but your Honor is the first who
19 actually took it on straight on and made the specific ruling.
20 And, like all lawyers, we are concerned that we not take
21 unreasonable risk when we have a deal that we can get done
22 where we might get an adverse appellate result. What the
23 Jefferson County -- the most recent Jefferson County case,
24 the District Court case, tells us is that our caution was
25 well justified. The last thing in the world the city would

1 need would be to go effective on a plan reliant on a
2 particular treatment of a particular class, find out that
3 notwithstanding the absence of a stay pending appeal,
4 notwithstanding the absence of a bond, that there is no
5 mootness protection for an important decision that
6 undermines -- that -- excuse me -- holds up the entire plan
7 of adjustment.

8 THE COURT: Well, there may be some merit to what
9 you say, but didn't the opinion turn more on the judge's
10 conclusion that the issue at hand, which was a constitutional
11 issue, could be effectively isolated in the sense that the
12 rest of the plan could go effective, in her view, and this
13 piece of it could be held up without prejudicing the parties
14 involved in the sense that you consider when you're talking
15 about equitable mootness?

16 MR. BENNETT: I certainly saw those words, and I
17 don't understand how they could possibly be true because
18 there you have -- that was a kind of closed system, a -- I
19 don't know the appropriate words to use for that state, but
20 it's --

21 THE COURT: Right.

22 MR. BENNETT: What we would call it is analogous to
23 DWSD.

24 THE COURT: Enterprise; right.

25 MR. BENNETT: Enterprise fund. And as I understood

1 the plan, it was, quote, "skinny," close quote, with the rate
2 increases that the board was required to implement that the
3 Bankruptcy Court retain jurisdiction to require that they be
4 implemented, and if those -- I didn't look at the price of
5 the bonds, but if those rate increases are now at risk or at
6 greater risk, open paren one, that's not good for the people
7 who hold the bonds, and, open paren two, they're going to be
8 in Chapter 18 because the bonds aren't going to -- debt
9 service isn't going down, and so if the rate increases are
10 unconstitutional and have to go, you know, back to a body
11 that might not make them, that's the whole plan.

12 THE COURT: I don't disagree with your criticism of
13 the opinion, but my point was that it was not so much that it
14 was a constitutional issue that the judge carved it out. It
15 was her view that it was a separate and isolated thing that
16 didn't relate to the economics of the deal in the sense that
17 you have characterized it here and with which I don't
18 agree -- I don't disagree.

19 MR. BENNETT: I will say, your Honor, that I'm
20 thrilled that Michigan courts will distinguish it, but I will
21 tell you that I didn't think that was a good day.

22 THE COURT: Okay. Well, on this point of unfair
23 discrimination, to what extent is it appropriate for the
24 Court to take into account the fact that the Michigan
25 Constitution does single out pension claims for something,

1 whatever it is? It's more than other creditors, something
2 more than other creditors. And what does -- what weight is
3 that to be given?

4 MR. BENNETT: Well, actually, the cases give you a
5 little bit of help in that regard because when talking about
6 discrimination, it talks about their rights under applicable
7 nonbankruptcy law. Several of the cases do that as an
8 additional basis for reasonable -- for the distinction, and I
9 think that one of the points that is clear is that outside of
10 Chapter 9 -- and I said we don't really know how it works.
11 I've made this point several times, but outside of Chapter 9,
12 a pension creditor is going to argue with support that there
13 is some form of priority or better treatment that they're
14 going to get as compared to other unsecured creditors. That
15 is the reality. No court in Michigan -- frankly, I'm not
16 sure if any other court has ever described exactly what that
17 constitutional protection turns into as a matter of dollars
18 and cents versus other creditors, but, as I said when I
19 covered the best interest point --

20 THE COURT: Yeah. See, you're such a bankruptcy
21 lawyer to be thinking about it in terms of dollars and cents.
22 I was thinking about it in terms of the judgment of the
23 people who ratified the Constitution that's reflected in this
24 special callout. Is that something worth considering?

25 MR. BENNETT: It is. It is worth considering under

1 the part of the rubric that focuses on applicable
2 nonbankruptcy law. It is not a rubric worth considering as a
3 basis to modify or restrict your ruling on the priority of
4 pension claims.

5 THE COURT: Yeah. I mean I've already held that
6 it's not conclusive; right?

7 MR. BENNETT: Correct.

8 THE COURT: That's what the eligibility opinion
9 said, but that doesn't mean it's entitled to no weight.

10 MR. BENNETT: As I said, there is a -- there is a
11 rubric in this category of where it would belong.

12 THE COURT: Okay.

13 MR. BENNETT: A couple of few extra points on this,
14 which is there is another element that is recognized as a
15 basis for discrimination, which is a necessity for
16 confirmation to confirm a plan. And I think there actually
17 the last quote that I read, Mr. Orr's quote about the fact
18 that at the end of the day this plan is dependent on a bunch
19 of things in order for it to work. When I get further on,
20 we're going to find out that, you know, many things have to
21 happen. One of them is implementation of the RRI's and,
22 frankly, a general improvement in the level of services to
23 residents. Having a consensual resolution with the workforce
24 is extremely valuable in achieving those things.

25 THE COURT: I've always wondered what that

1 particular element actually adds to the analysis because
2 really if the other tests are met, is a judge going to reject
3 it on this ground?

4 MR. BENNETT: I would hope not, but it's an
5 additional --

6 THE COURT: I mean but can you even construct a
7 hypothetical where that might happen? It's just -- it seems
8 highly unlikely.

9 MR. BENNETT: I find it hard to do. And then the
10 last point -- the last item in the list of treatment issues
11 is meaningful recovery, and here, frankly, meaningful has to
12 be determined against the circumstances of the case that
13 it -- a meaningful recovery can't be that, oh, let's do it
14 always versus a hundred because a meaningful recovery has to
15 be, to some extent, calibrated by the economic circumstances
16 of the relevant debtor. And here the economic circumstances
17 of the debtor -- I mean look where we are. We are \$7 billion
18 plus coming off the books, massive deferrals of others. You
19 know, this is -- should be regarded as a great case in terms
20 of how much has been accomplished, but it's never going to be
21 regarded as a great case in terms of recoveries. It's great
22 only under the circumstances, and so we think that even
23 though there are low recoveries in this case -- and we don't
24 like that part. This case would have been much easier with
25 higher recoveries to creditors generally. Under the

1 circumstances, the recovery is meaningful.

2 THE COURT: So you've gone through the Aztec
3 factors.

4 MR. BENNETT: I have.

5 THE COURT: You remember that dialogue I had with
6 Mr. Hackney about not liking that one or the Markell one, and
7 he said the Rhodes test?

8 MR. BENNETT: Well, you're not alone.

9 THE COURT: Here's my problem with Aztec and
10 Markell. If Congress wanted to be any more specific about
11 how a judge should go about evaluating unfair discrimination,
12 it would have said so in 1129(b) just like it did, by the
13 way, on fair and equitable. I mean there's a page of
14 description there on how a judge should do that, and yet for
15 unfair discrimination all we've got is unfair discrimination.

16 MR. BENNETT: Right.

17 THE COURT: Why is that anything more than the judge
18 making the best judgment he or she can on whether it's fair
19 or not in --

20 MR. BENNETT: You have distinguished company. He's
21 in the wrong circuit. His name is Judge Posner, who wrote an
22 unfair discrimination case -- I think we cited it -- where he
23 says exactly what you just said, which is that he's
24 unsatisfied with the Aztec case. I don't remember whether he
25 covered the Markell test as well, but he was very unsatisfied

1 with the tests and said at the end of the --

2 THE COURT: Well, if he didn't like Aztec, he surely
3 isn't going to like Markell.

4 MR. BENNETT: So but at the end of the day, he comes
5 exactly to your Honor's conclusion that this is -- that this
6 has to be a matter of fairness and equity, and it's -- and it
7 is left to the discretion of the trier of fact and --

8 THE COURT: Is there any Sixth Circuit law that
9 requires the adoption of one test or the other?

10 MR. BENNETT: No, there is not. We looked. There
11 is not. And the fact that some judges -- the Aztec court
12 is -- what the Aztec court is doing is trying to put order in
13 the cases that it got. You know, that's -- when you read the
14 Aztec case --

15 THE COURT: Well --

16 MR. BENNETT: -- that's what they're trying to do.
17 Doesn't necessarily mean it's the right thing to do, but
18 he -- but I think the standards of Aztec are really that
19 judge collecting cases that, frankly, are more like the --
20 that themselves are decided more along the lines as you would
21 decide them, and then they say, "Okay. By collecting these
22 cases, I find --

23 THE COURT: Okay.

24 MR. BENNETT: -- these are the things that
25 predominate."

1 THE COURT: These are the things that were looked
2 at. All right.

3 MR. BENNETT: If we're going to take a break, this
4 is a good place to do so. I know I'm running a little over,
5 but there were interruptions, so --

6 THE COURT: It's my fault. Got it.

7 MR. BENNETT: Well, some of it was those COPs and
8 the reading --

9 THE COURT: All right. Let me give you a little bit
10 of homework over the break --

11 MR. BENNETT: Okay.

12 THE COURT: -- in addition to the questions that I
13 already posed to you last time. Hold on one second. Okay.
14 In addition to the list, which we've made good progress on,
15 we need to review the whole issue of what the plan intends to
16 do with respect to 1983 claims against individuals in
17 their -- against officers in their individual capacity
18 because we have dug deep into the weeds of what the plan says
19 about this, and we cannot figure it out, so we need to know
20 what your intent is before we can determine whether it's
21 consistent with the law.

22 MR. BENNETT: Okay.

23 THE COURT: Second, fair and equitable. In the
24 context of a municipal case, what does it mean because in a
25 Chapter 11 case mostly it focuses on whether the plan

1 properly prioritizes among different classes or different
2 kinds of creditors? How does that work in a Chapter 9 case?

3 MR. BENNETT: Okay.

4 THE COURT: With regard to exhibits, we have a list
5 of all of the exhibits we think were admitted into evidence.
6 We will give that to you and ask you to, "A," review it, let
7 us know any discrepancies that you identify, and, "B," please
8 give us either one paper set or one electronic set of just
9 those exhibits that were admitted. Okay?

10 MR. BENNETT: Okay.

11 THE COURT: We'll break now for lunch and reconvene
12 at 1:30.

13 MR. BENNETT: Thank you.

14 THE CLERK: All rise. Court is in recess.

15 (Recess at 12:02 p.m., until 1:30 p.m.)

16 THE CLERK: All rise. Court is in session. Please
17 be seated.

18 MR. BENNETT: Good afternoon, your Honor. Bruce
19 Bennett, Jones Day, for the City of Detroit.

20 THE COURT: You may proceed.

21 MR. BENNETT: Thank you, your Honor. Why don't I
22 deal with the homework assignments first? On 1983 claims,
23 there are actually several provisions in the plan that come
24 together to deal with them, so let me give them to you. The
25 first is the definition of indirect employee indemnity claim.

1 That's definition Number 224. And what that does is it
2 basically -- well, I mean the fundamental problem is for all
3 these issues you have an employee of the city, police
4 officer, fire, whatever, who is acting within the course and
5 scope of his employment and something happens, and the
6 applicable nonbankruptcy law prefiling would be that the
7 officer gets sued even though it's within the course and
8 scope of his employment. The city is sued. That's who the
9 target really is. There is a claim against the city to the
10 extent within course and scope, and if for some reason a
11 judgment is entered into against the officer within the
12 course and scope but the city isn't, the officer has
13 indemnification. As a baseline matter --

14 THE COURT: And just to be clear, this can happen
15 because under 1983 law, there is no respondeat superior
16 liability; right?

17 MR. BENNETT: Well, it -- okay.

18 THE COURT: There's only liability if the individual
19 was acting pursuant to municipal policy or direction or law
20 or whatever.

21 MR. BENNETT: Exactly. So this is the only universe
22 we're talking about. None of the plan provisions I'm about
23 to get into deal with a situation where an employee is
24 determined to have acted outside the scope of employment and
25 inappropriately, you know, beyond that scope, and that's when

1 the employee is on his or her own, and none of these
2 provisions deal with that case.

3 THE COURT: That would not be a 1983 case?

4 MR. BENNETT: Correct.

5 THE COURT: So in this context, what have we tried
6 to do? What we tried to do is because now a claim against
7 the city is a 13-cent claim under -- is a general unsecured
8 claim, the officer's indemnification claim, in the absence of
9 doing something to protect it, would also be an unsecured
10 claim. And what we are trying to prevent is the idea that an
11 officer acting within the scope of -- course and scope of his
12 authority would become liable for a judgment either together
13 with the city or somehow separately from the city and would
14 only have the 14-cent indemnification or the -- or not have
15 anything at all so have to make up the difference between the
16 14 cents and a hundred cents. So what we've done is
17 identified this class of indirect employee indemnity claims,
18 which is the claim of the third party to the extent that the
19 officer is entitled to indemnification, so it's really the
20 claim that is effectively the claim against the city that
21 someone is trying to enforce --

22 THE COURT: Okay. But this is where I get confused
23 because the fact that the employee has a right of
24 indemnification against the city -- and that raises other
25 questions, but does that somehow create any rights in the

1 plaintiff?

2 MR. BENNETT: It doesn't create rights in the
3 plaintiff. What we're trying to prevent is for a claim that
4 is a claim against the city and, incidentally, a claim
5 against the employee becoming the employee's problem because
6 the city is not going to pay in full.

7 THE COURT: Okay.

8 MR. BENNETT: That's what we're trying to deal with,
9 and we also don't want to put the city in a position where by
10 litigants going after individuals the city then feels
11 pressured to pay hundred cent indemnities, thereby indirectly
12 creating a favored class of unsecured creditors against the
13 city, so we're trying to prevent both those things from
14 happening at once.

15 THE COURT: Wait. Could you repeat the second one?

16 MR. BENNETT: Again, dealing solely with a group of
17 claims where it's within the course and scope of the
18 individual's employment, if a plaintiff sues the city and
19 sues the individual, maybe even drops the city, sues the
20 individual and the individual then for whatever reason the
21 city feels compelled to do a post-effective date
22 indemnification of that person, you've effectively wound up
23 elevating a class of claims against the city because they can
24 harass an officer, and so we are -- that's the entire purpose
25 of the series of provisions is designed to prevent that by

1 basically saying --

2 THE COURT: All right. Well, let's pause again.
3 The city does not intend to discharge or in any way deal with
4 a plaintiff's claim against an officer when that officer is
5 sued in his or her individual capacity; is that right?

6 MR. BENNETT: In his individual capacity and outside
7 of the course and scope of his employment. If he's being
8 sued in his individual capacity but within the course and
9 scope of his employment, he's being protected. If it's
10 outside the scope of his employment, he is not protected.

11 THE COURT: All right. So how is that consistent
12 with Barber --

13 MR. BENNETT: Your Honor, I think --

14 THE COURT: -- because I thought Barber said that
15 the city's bankruptcy cannot discharge claims against an
16 individual when they are sued in their individual capacities?

17 MR. BENNETT: I think Barber when it says
18 "individual capacity," it means outside the course and scope
19 if I remember the case correctly. I have read it. I haven't
20 read it recently. I think Barber draws the line in exactly
21 the place I was drawing the line, and that is when an
22 individual is being sued in the course and scope of his
23 employment, Barber says that's really a claim against the
24 city masquerading a claim as an individual. I think Barber
25 is carving out --

1 THE COURT: Well, but I think we have to be careful
2 about our language here because, again, under 1983 law, it
3 isn't enough to impose liability on the city that the officer
4 was acting within the scope of their employment. That may
5 impact the employee's rights against the city, but it doesn't
6 impact the plaintiff's rights against the city. The only
7 time the city is liable for the act of an individual is when
8 it's pursuant to municipal policy or rule or practice or
9 whatever, and there's a distinction between that and scope of
10 employment.

11 MR. BENNETT: Okay. I understand what your Honor is
12 saying, and I'm not remembering exactly where the Barber line
13 is. We are trying very hard to limit lawsuits against
14 individuals in circumstances where it's really a claim
15 against the city and that there shouldn't be a separate claim
16 against the individuals because, frankly, we're not seeking
17 to create more business for the Bankruptcy Courts for all
18 those individuals, and so we think that well within Chapter 9
19 law is the concept of protecting officers and inhabitants to
20 the same extent as the city is protected when it's really a
21 claim against the city, and if there's -- you know, if your
22 Honor thinks the line is somewhere between the -- within
23 policies and course and scope, we'll have to live with the
24 line that you draw, but we are certainly looking for the
25 maximum protection possible for the employee in that

1 circumstance and are not seeking protection for the employee
2 who has suffered --

3 THE COURT: Well, to what extent, though, is the
4 city obligated to provide indemnity?

5 MR. BENNETT: The city, I think, is -- I think the
6 city's indemnity goes all the way to course and scope, but
7 I'm not exactly certain of that, and I'll find out before --

8 THE COURT: Well, I was actually asking a slightly
9 different question. If I recall correctly from prior
10 hearings, what the position of the city has been is that it
11 has the discretion to indemnify or not. Sometimes it does,
12 and sometimes it doesn't. It's not a legal obligation.

13 MR. BENNETT: I'm actually informed that in some
14 instances it's contractual under CBAs, so I don't -- there
15 may be discretion in some area, but I don't know exactly
16 where the discretion kicks in. I can get those answers.

17 THE COURT: Wouldn't the city's obligation to
18 provide indemnity be a dischargeable debt in and of itself?

19 MR. BENNETT: Yes, it would, your Honor, but the --
20 but there are practical circumstances that the city has to
21 consider in whether it can rely upon a discharge in those
22 circumstances.

23 THE COURT: So the city's position is that if a
24 claim against an individual, however it's denominated, might
25 result -- we'll argue about might or would -- in a claim by

1 that officer against the city, then the plaintiff's claim
2 against the officer is discharged and dealt with in Class 14?

3 MR. BENNETT: Actually, to clarify, as a technical
4 matter, the claim against the individual is subject to the
5 plan injunction, and, frankly, that provides its own escape
6 valve because if there's some way in which that's
7 misinterpreted, it comes back here in the form of some effort
8 to get relief from that injunction.

9 THE COURT: But otherwise what I said is correct?

10 MR. BENNETT: Right; correct. With that exception,
11 what you said is correct.

12 THE COURT: And so the question remains how to
13 reconcile that with Barber or to disagree with Barber. I had
14 thought -- I mean we went back and actually looked at the
15 transcript of the hearing on the legal issues, and this was
16 one of the legal issues, and I had thought you had
17 represented to the Court that it was the intention of the
18 city in the plan to comply with Barber.

19 MR. BENNETT: Your Honor, I may not have spotted the
20 difference between the two standards that you did. I think
21 the city clearly is looking for the maximum protection for
22 the employees in these circumstances.

23 THE COURT: And for itself.

24 MR. BENNETT: And for itself, but I mean the city
25 ultimately can get the protection, but insisting on all the

1 protection the city might insist upon creates a problem
2 without this additional relief, so --

3 THE COURT: Okay.

4 MR. BENNETT: -- it all fits together in that way.
5 And you must have found it, but the paperwork on this -- the
6 briefing was in Docket 7143, and it starts at paragraph 302.

7 THE COURT: Right. Thank you.

8 MR. BENNETT: Okay. Second question that your
9 Honor -- well, before we get to the second question, there is
10 one thing I did not mention in connection with the business
11 considerations that might be relevant to your Honor in the
12 discrimination analysis, and that is is that prefiling -- I
13 think this was also in the eligibility hearing record --
14 employees did have salary cuts -- had pay cuts and other
15 changes to work rules, so in some sense their contributions
16 is not just measured by the pension changes but other aspects
17 of their relationship as well.

18 With respect to fair and equitable, first of all,
19 your Honor is absolutely right that in the Chapter 11 context
20 it's got the ordering provision effectively. Where the money
21 runs out is where the distributions stop. And I will point
22 out to your Honor that in our plan we do that as well. We do
23 have a class of subordinated claims, and there is no
24 distribution there, so at least to the extent that it can be
25 applicable to a Chapter 9 case, we've complied with it. With

1 respect to the --

2 THE COURT: But is that the end of the analysis?

3 MR. BENNETT: The cases add basically -- in my view,
4 they say and we really mean it when we said best interest
5 because they basically apply in the fair and equitable
6 standard the reasonable expectations approach, which is why I
7 said when I started that section that I'm going to say best
8 interest, but it is a fair and equitable consideration as
9 well. And, you know, that, of course -- it doesn't really
10 connect up with things that we think of as the fair and
11 equitable rule --

12 THE COURT: Right.

13 MR. BENNETT: -- accomplishing in a Chapter 11 case,
14 but I suppose it's a substitute for the discipline that comes
15 from a plan that wipes out equity. I can't -- I don't really
16 have another explanation for it, but it does not seem to have
17 a distinct meaning from the best interest test at least as
18 we've dealt with it in this case.

19 THE COURT: And yet I was looking at one of the City
20 of Avon Park decisions by the Supreme Court that dealt with
21 the 943(b)(3) fee issue, which we will get to --

22 MR. BENNETT: Um-hmm.

23 THE COURT: -- which goes on at great length about
24 the fundamental duty of the Court to assure that the plan is
25 fair and equitable and does not marginalize it at all in the

1 way, you know, that just sort of linking it up with best
2 interest of creditors does.

3 MR. BENNETT: Your Honor, I've read as many cases as
4 I can possibly read on this, and I don't find anything
5 different substantively than what is -- that was already
6 embodied in best interest. I do understand that the Code
7 says that it's supposed to be fair -- not discriminate and
8 fair and equitable. That's still part of -- that is still
9 part of the standard, and as I said before, we have complied
10 with it to the extent that we --

11 THE COURT: No. The law doesn't like redundancy in
12 statutes, doesn't like to interpret them as redundant.

13 MR. BENNETT: Well, it is defensible. We don't
14 actually know whether best interest expanded to duplicate
15 fair and equitable or fair and equitable bothered because you
16 could decide if you were seeking to rationalize this in a
17 defensible way and clean up what may be some ambiguity that
18 doesn't belong is you could find that the best interest test
19 is really about the -- is really about the comparison to
20 nonbankruptcy alternatives, and the fair and equitable is
21 really about reasonable expectations. And, in fact, that
22 does fit nicely with the differences between the tests in the
23 non-Chapter 9 environment, but you would not find it's --

24 THE COURT: But reasonable expectation of what?

25 MR. BENNETT: Creditors.

1 THE COURT: Right, but reasonable expectation of
2 creditors regarding what? What they could get outside of
3 bankruptcy or what they should be able to get inside of
4 bankruptcy?

5 MR. BENNETT: I think it's -- I think it is measured
6 with respect to what they can get outside of bankruptcy as
7 every creditor's rights ultimately are, but I think it has
8 something to do --

9 THE COURT: Well, but that's the best interest test.
10 That doesn't feel like a fair and equitable test.

11 MR. BENNETT: I can't help.

12 THE COURT: Thanks.

13 MR. BENNETT: Can't help.

14 THE COURT: Well, I'm --

15 MR. BENNETT: I was in law school when they wrote
16 this.

17 THE COURT: You know, the judge in me wants to try
18 to rationalize all of this and doesn't like, you know, the
19 fact that Congress very explicitly decided which pieces of
20 Chapter 11 were going to go into Chapter 9, and I have to
21 assume that these tests are intended to have different
22 meanings and different effects and different --

23 MR. BENNETT: Well, remember, it does. I mean
24 because we have the -- because we have publicly issued
25 securities, because we have the possibility of penalty

1 claims -- we actually do have a hierarchy as to which the
2 fair and equitable test applies in this case, no question.

3 THE COURT: In this case, and there could be a
4 circumstance where we have senior debt --

5 MR. BENNETT: Exactly.

6 THE COURT: -- and all of that, but -- and I get
7 that, but it's hard to rationalize this decision in Avon Park
8 with that.

9 MR. BENNETT: I understand that.

10 THE COURT: Okay.

11 MR. BENNETT: Okay. The next topic -- and I don't
12 think this has to deter us very long -- is the issue of
13 whether the plan was proposed in good faith. I think there's
14 been ample evidence that the city's intent in going through
15 this process has been to restructure its indebtedness and,
16 frankly, revitalize this municipality through improving
17 services and overcoming years of deferred investment. That's
18 exactly what these Chapter 9 cases are supposed to be about.
19 This is exactly the relief Detroit needed, and it's gone
20 about it, I think, in the right way. The plan as well -- the
21 actual details and terms and conditions of the plan were also
22 proposed in good faith. We've now been through eight
23 iterations adding increasing amounts of compromise every step
24 of the way.

25 THE COURT: Yeah. There's another test that's hard

1 to define without overlapping everything else.

2 MR. BENNETT: There's no question that it is, and it
3 gives objectors lots of things to talk about, but we
4 definitely believe that we meet the test, and we meet the
5 test through, frankly, the conduct that your Honor has
6 observed from the very beginning.

7 Before I get to feasibility, which is going to be my
8 last topic, I have a few additional topics that I need to
9 cover, some of which picks up the questions that your Honor
10 asked about, and the first one is exit financing. A couple
11 of different things about exit financing. First of all, 364
12 is not applicable to exit financing. There's actually a
13 series of cases that say that, and I can give you the cites
14 for them. It also makes sense because the exit facility, of
15 course, is not borrowed until the effective date when the
16 Chapter 9 case is effectively over, and all of the
17 obligations that go after that are after that, after the city
18 is long out of its Chapter 9 case. There are --

19 THE COURT: Is that point in your brief somewhere?

20 MR. BENNETT: That point I don't think is in my
21 brief anywhere, so --

22 THE COURT: Then give me your best case.

23 MR. BENNETT: One second. Okay. The best case is
24 In re. Hickey Properties, Ltd., 181 Bankruptcy Reports 173,
25 Bankruptcy District Vermont, 1995.

1 THE COURT: Okay. So if 364 doesn't apply, what is
2 the standard for approval if you are, indeed, requesting
3 approval?

4 MR. BENNETT: We are, indeed, requesting approval.
5 As is conventional, of course, in Chapter 11 cases, the exit
6 facility lender is requesting approval of a number of
7 different things, and so I went through the statute, and so
8 let me explain the several places where I think this fits and
9 show you that we think the record is covered.

10 THE COURT: Okay.

11 MR. BENNETT: First of all, 1123(a)(5), which, of
12 course, is incorporated, requires that the plan provide
13 adequate means for implementation, including, open paren J,
14 issuance of securities of the debtor for any appropriate
15 purpose. The exit facility, of course, is going to
16 ultimately be public. We regard that as arguably securities
17 of the debtor, and so it is appropriate for this Court to
18 enter an order that the purpose of the exit financing is
19 appropriate, the uses are shown in the projections, there's
20 been ample testimony about them, there are no inappropriate
21 uses of the exit facility.

22 Section 1123(b) permits the plan to include any
23 other provision not inconsistent with the applicable
24 provisions of this title. We're actually going to come back
25 to this provision in a different context later. The plan

1 provides for the exit facility, so a finding that it is
2 appropriate and not inconsistent with the applicable
3 provisions of Title 11 is an appropriate thing to ask for,
4 and we think it's true.

5 Section 943(b)(3), which we're going to come to in a
6 minute, deals with the fee question. There are fees and
7 reimbursements to Barclays. There has been testimony -- and
8 I'll put up a demonstrative of it in a second -- showing that
9 the fees that are proposed to be paid to Barclays and the
10 expense reimbursement was on the low end of the different
11 proposals. It was one of the reasons Mr. Buckfire testified
12 that the Barclays proposal was the one that should be
13 accepted by the city so we think a determination that the fee
14 and expense payments are reasonable.

15 943(b)(4) requires the Court find the debtor is not
16 prohibited by law from taking any action necessary to carry
17 out the plan, so we're asking for a provision that fits
18 within that as well. By the way, this is authorized as LTGO
19 debt because it's basically the pocket it's going to fit in
20 in a post-reorganization world.

21 943(b)(6) requires the Court find that any
22 regulatory or electoral approval necessary under applicable
23 nonbankruptcy law in order to carry out any provision of the
24 plan has been obtained or such provision is expressly
25 conditioned on such approval. Here Mr. Buckfire testified

1 that the city council approval, Michigan Finance Authority
2 approval, and Emergency Loan Board approval had all been
3 obtained. These are regulatory approvals, so we think that
4 that's an appropriate request. And, in addition, again, as
5 is customary, the lender has requested as a condition to
6 financing or to funding findings that it acted in good faith,
7 that the terms are reasonable, not subject to attack in a
8 later bankruptcy, as an avoidable transfer or obligation. By
9 the way, that one is really easy. This is a loan, so you can
10 pledge collateral for a loan without it ever being a
11 fraudulent transfer. It's not a preference. And, finally,
12 that the obligations are legal, valid, and binding, and,
13 again, I mentioned that this is a -- covered by the UTGO
14 pocket for purposes of --

15 THE COURT: Earlier you said LTGO.

16 MR. BENNETT: I'm sorry. LT. I misspoke. LTGO
17 pocket. And so it does fit within the relevant statutory
18 scheme. Two points. Two more points. One, what does first
19 budget obligation mean or first budget item? I think your
20 Honor asked a question about that.

21 THE COURT: Okay. Before you go there, I have one
22 last question on the exit financing. Section 364 for this
23 kind of financing requires the Court to find that unsecured
24 credit was not available. I take it it's your position that
25 that finding is not necessary in this circumstance.

1 MR. BENNETT: That's absolutely correct, your Honor.
2 We don't think it's necessary, and in a minute I'll show you
3 a demonstrative actually in one of the exhibits to clear up
4 some ambiguity about what we thought about costs and what
5 have you.

6 THE COURT: Okay.

7 MR. BENNETT: I'll get there in a second. I did
8 want to talk about the first budget item. What does it mean?
9 The reason the language becomes relevant for the exit
10 facility is not because we put it there but because it's an
11 attribute of LTGO financing. This is a statutory point, and
12 what it means as a matter of applicable nonbankruptcy law
13 turns out not to be clear at all. There has been never a
14 case that has been ever decided on this point, and, as your
15 Honor probably figured out, this first budget item language
16 is used elsewhere referring generally to things like police
17 protection, fire protection, and I assume in the Ebola age
18 public health protection, so we can't offer you any
19 additional content to the meaning of this, but it is not
20 something that we're --

21 THE COURT: My question on first budget was in the
22 context of B notes.

23 MR. BENNETT: Okay.

24 THE COURT: Are B notes first budget items, too?

25 MR. BENNETT: They're also issued under the same

1 LTGO-type pocket.

2 THE COURT: So how many first budget items can a
3 city have?

4 MR. BENNETT: It already had a bunch when you
5 include the police and the fire and public health and all of
6 such things. Your Honor, I regard that as -- I'm going to go
7 back to the eligibility hearing where I talked about this
8 problem, which is actually not a Michigan law problem. This
9 is pervasive in municipal law generally. What seems to
10 happen is that an interest group or a governmental unit aided
11 by an interest group wants to create some form of financing
12 or wants to create -- protect some form of constituent, and
13 one guy over there says, "Oh, I want a constitutional
14 amendment that says you can't impair. The other guy says, "I
15 got a better idea. I want a pledge." And the other guy
16 says, "Oh, I got an even better idea. I want a first budget
17 item," but these happen. This one happens in January. That
18 one happens in March. The next one happens in September, and
19 no one ever considers them together, and they get rolled in.
20 And so a very, very --

21 THE COURT: No one ever thinks about what they mean
22 in the context of a bankruptcy?

23 MR. BENNETT: They don't -- well, forget --
24 certainly that. They don't ever reflect on what they mean in
25 competition with each other.

1 THE COURT: Um-hmm.

2 MR. BENNETT: And this to me is a very, very good
3 reason why, open paren one, we have Chapter 9 and, open paren
4 two, why Chapter 9 must preempt all of this. Now, that's not
5 the issue when we go forward from here. When we go forward
6 from here, we assume and believe that the -- all of the debts
7 that are created -- that are obligations of the city post-
8 reorganization, post the plan of adjustment are going to be
9 paid and they're going to be paid when due, and we're not
10 coming back for Chapter 18. And in that context, hopefully,
11 none of this will ultimately have any significance, but
12 the --

13 THE COURT: Is the city's obligation to fund the
14 pension UAAL also a first budget item?

15 MR. BENNETT: Well, actually, it doesn't seem to be
16 covered by that particular rubric, but it's the second half
17 of the constitutional protection that says you're supposed to
18 do full funding, so do I have any idea what it means to
19 collide between a first budget item and a full funding? No,
20 I don't have any idea. I think -- I hope we never get there,
21 and I hope similar questions don't come up with very many
22 municipalities, but I know how it happens, and it is not a
23 great state of affairs from the perspective of insolvency
24 lawyers who want to achieve out-of-court deals.

25 Back to the issue of the collateral, last time we

1 used the projector, I think, is to take a quick look at
2 Exhibit 642, which is in evidence, and I've asked Mr. Ferry
3 to take -- to give us one column from page 12 and one column
4 from page 9 to make this very easy, and this is a comparison
5 of the Barclays proposals. And, your Honor, the one thing I
6 want to draw out of this is the differences in price, and, as
7 you'll see if you zero into the pricing box, the pricing
8 boxes on both pages -- they're more or less next to each
9 other -- the differences are in the ballpark of 200 basis
10 points, which is not insignificant. The other point that --

11 THE COURT: Well, I remember this, but I also
12 remember very different testimony from Mr. Buckfire.

13 MR. BENNETT: I remember that as well, and he was
14 very optimistic about how this might close up, but at the end
15 of the day it didn't close up. These are the -- this is the
16 last unsecured proposal that the city actually obtained.

17 THE COURT: Well, but his testimony was after this.

18 MR. BENNETT: No. I know his testimony was after
19 it, but it was a projection of how he thought that the market
20 would be more -- prove to be ultimately more receptive.

21 THE COURT: Well, but he's your expert.

22 MR. BENNETT: I understand that, your Honor. We do
23 think that the secured financing that's been arranged is the
24 best opportunity for the city for exit financing and that it
25 ought to be approved. I will point out one other thing,

1 which is that the unsecured alternative was going to include
2 restrictions as well and coverage tests and other things that
3 would govern future financing and affect the city's
4 flexibility, so it's not -- it is not true that secured
5 means --

6 THE COURT: Well, but Mr. Buckfire didn't testify to
7 that.

8 MR. BENNETT: I don't think they got far enough in
9 fleshing out the specific terms and conditions, but I've done
10 this long enough --

11 THE COURT: Well, I have to go by the record; right?

12 MR. BENNETT: You do, and this is in the record as
13 well. So with that on the financing, we urge that your Honor
14 approve it, and the provisions that will be included in the
15 proposed confirmation order are, of course, you know, things
16 the city wants to do but, more importantly, they're things
17 that Barclays is insisting on.

18 THE COURT: Well, let me just ask you this question
19 in the alternative. If the Court does conclude that Section
20 364 applies here, contrary to your position, and, therefore,
21 has to find that unsecured financing is not available, what
22 does the case law say about the circumstance where the
23 unsecured financing is more expensive than the secured
24 financing? Do you know?

25 MR. BENNETT: I don't know what the cases say in

1 that context.

2 THE COURT: All right.

3 MR. BENNETT: I would hope they take into
4 consideration the difference. I now want to turn to the
5 issue of releases, and this applies actually to several
6 aspects of the plan. We just saw one in the 1983 context.
7 It most prominently applies to the state settlement and the
8 releases to be running to the state. And we briefed this
9 extensively, and we took the Court through the list of
10 factors that really come from the Dow case, but before -- I
11 mean I'm not going to repeat that. I want to add an overlay
12 that I think is important that we do mention in our brief,
13 but I think it bears the most emphasis. Bankruptcy Code
14 Section 524(e), which is the provision that prohibits third-
15 party releases in every other chapter of the Bankruptcy Code,
16 does not apply to Chapter 9, and, moreover, that doesn't look
17 like an accident because 524(a)(2), which is on the page or
18 two before, is incorporated, so it's not as if people skipped
19 over the section without thinking carefully what was in and
20 what was out. Clearly there was examination of 524, and (e)
21 was explicitly left out. And it is 524(e) which many courts
22 mention it, many don't, that is the provision that would
23 cause a plan that had a third-party release to offend 1129 --
24 excuse me -- 1123(b), which is provisions inconsistent with
25 this title, and it would -- obviously it could cause, if it

1 was incorporated into Chapter 9, violation of the 943
2 provision that keys off of violating provisions of the
3 chapter. And, in addition, it is that same 524(e) that has
4 frequently prevented courts from using Section 105 to extend
5 injunctions to third parties where they need to, so the first
6 point of --

7 THE COURT: For whatever it's worth to you, probably
8 nothing in light of Dow, I actually never thought that
9 Section 524(e) had anything to do with third-party
10 releases --

11 MR. BENNETT: Okay.

12 THE COURT: -- because it talks about the discharge
13 not affecting the liability of another person, but I think
14 we're long since past that.

15 MR. BENNETT: Okay. In any event, the -- what I
16 think that observation does is basically, first, clear the
17 field in terms of whether Chapter 9 has anything in it that
18 prohibits third-party releases, but I would also submit that
19 there's another aspect of Chapter 9 that suggests that we're
20 supposed to be looking at things a little more broadly
21 because -- and, by the way, there's the same -- there's the
22 same kind of thing in Chapter 13 with respect to co-debtors
23 in certain circumstances. In Chapter 9 we have 922(a)(1),
24 which is the provision that applies the automatic stay to
25 officers and inhabitants, so, in addition to there being

1 the -- what looks like conscious exclusion of a provision
2 that might get in the way of third-party releases and make
3 them extraordinary under something like the Dow standard, we
4 actually have a signal that in Chapter 9 there's a little bit
5 broader thinking about which kinds of entities ought to be
6 protected as a result of the Chapter 9 case. And with
7 respect to at least the state settlement, the state is
8 providing quite a bit of money that gets distributed to all
9 pensioners on account of claims that pensioners might have,
10 may have been threatened against the state, and it is
11 perfectly reasonable within the contemplation of the test
12 even without the observations just made here, but
13 particularly in light of the observations made here, it is an
14 appropriate provision in a plan in this case. I would also
15 say that for the very same reasons, to the extent that the
16 pension funds, which are really just city property on a way
17 station on the way to pensioners, that the fact that they are
18 protected by the plan injunction is also eminently reasonable
19 and appropriate, and it seems like the other -- the kind of
20 situation that might have been contemplated when 524(e) was
21 excluded from application to Chapter 9.

22 Next topic, disclosure and reasonableness of
23 payments, really fees. I want to start with the facts of the
24 case because they're important, too. I think all the things
25 that I mentioned at the beginning are quite relevant when

1 considering reasonableness of fees in the case and in a
2 slightly different order. We are on the verge of confirming
3 a plan that in many senses was regarded by many people as
4 pretty radical when it was first proposed, and it is a -- was
5 then and still is a comprehensive effort to solve some really
6 bad problems, and it really did -- really does create new
7 precedents in the field of Chapter 9 and uses the law in the
8 way it was intended but a way it hasn't been used before.
9 That it's largely consensual is great, but it certainly
10 didn't start out that way, and it is the -- because it didn't
11 start out that way for the most part that the case did cost a
12 lot of money. And it was done in record time. You know,
13 that's actually significant because we did some looking at
14 professional fees in cases that were more or less the same
15 size as the City of Detroit case, and while you can find some
16 that were less like GM and Chrysler that are bigger, but
17 because they were done so quickly, as a matter of weeks, they
18 came in lower, although still, you know, a huge amount of
19 money, the cases that are about this size that ran normal
20 course through Chapter 11 are all more expensive, much more
21 expensive than this case has been.

22 From the perspective of a person who's spent a fair
23 amount of time at the podium in this case, I have some other
24 observations that are important. You know, at virtually one
25 point or another every major creditor constituency was here

1 asserting a litigation position. I mentioned the swaps as an
2 exception but Syncora taking their place. It was the
3 retirees in eligibility, COPs in many contexts, the UTGO and
4 LTGO in their adversary proceedings, the DWSD debt in the
5 confirmation hearing, counties in opposition to the plan, the
6 36th Court District, the library employees. In almost every
7 case and certainly in every matter I handled personally here,
8 there were multiple parties, each of which had a big budget
9 and using it opposing the city, so, again, for examples as to
10 which I and you have personal knowledge, in the UTGO and LTGO
11 litigation, I think we had three pairs of law firms on the
12 other side. In the DWSD debt litigation, which didn't
13 actually make it into open court, but we had that one
14 session, I think it was six against one or something like
15 that. And this pattern continued over and over again even as
16 the confirmation hearing began. I said to someone outside
17 that I had kind of gotten used to it, and I'm slightly
18 uncomfortable having all these people on my side of the room
19 for a change. But are the city's professional fees going to
20 be high in a case like this? Of course they are. And
21 because they are high, are they unreasonable? Of course they
22 are not. It is a public case, though, and there is,
23 therefore a need that the costs of the case be disclosed and
24 vetted to make sure that there's no abuse, and from the very
25 beginning of this case, I think your Honor has adequately

1 addressed this need. And, of course, you have a fee examiner
2 who is applying what he believes the 943(b)(3) standard is,
3 and, frankly, it does appear he's applying it -- frankly, if
4 there's a continuum between reasonableness testing under
5 943(b)(3) or the Chapter 11 analog and the allowance process
6 under the Chapter 11, Chapter 7, other chapters of the
7 bankruptcy law, he's somewhere in between and maybe even
8 tilting toward -- more toward item-by-item review, which, of
9 course, the cases say isn't what is required in the 943(b)(3)
10 context. The plan has a provision requiring that the fee
11 examiner process continue even after the end of the case to
12 deal with fees that have been accrued but not yet been the
13 subject of invoices.

14 THE COURT: What's the end of the case?

15 MR. BENNETT: We're hoping -- I don't know if I'm
16 speaking out of school, but we're hoping before Thanksgiving
17 for an effective date. That, of course, depends upon exactly
18 when your Honor rules and --

19 THE COURT: That was really my question. Is the end
20 of the case defined as the effective date?

21 MR. BENNETT: I don't remember how it's defined, and
22 I don't think the -- I don't think anyone has a stake in when
23 it's defined. I'm perfectly comfortable defining it as of
24 the effective date. I'm not intending for anything to be
25 left out.

1 THE COURT: So the city's position is that 943(b)(3)
2 would require the Court to review fees incurred through the
3 effective date?

4 MR. BENNETT: I think it's -- I'm prepared to
5 stipulate that that's what it should be -- how it should be
6 determined because technically the case is still open. So,
7 in any event, the -- so we think that that process is
8 working. The emergency manager's office, which has retained
9 the responsibility for the Chapter 11 case, is committed to
10 review all fee and expense requests and make sure that they
11 are satisfied that they are reasonable. There is no
12 feasibility question related to the fees. There has been
13 a -- they've been budgeted from the beginning, adjustments
14 made where adjustments were deemed necessary as a result of
15 what actually happened on the ground, and, lastly, there is a
16 provision in the plan to create an appropriate reserve in
17 order to see that these items are paid. These arrangements
18 satisfy the requirements of 943(b)(3), and I think your Honor
19 is in a position, therefore, to make a ruling that there's no
20 obstacle to confirmation because some fees have not yet
21 worked their way completely through the system. Last topic.

22 THE COURT: Well, you cited a case to me, which I
23 can get for you, but I'm sure you're aware of it, that said
24 that as long as the plan or the order confirming the plan
25 creates a process for review of the fee post-confirmation,

1 which in a case like this turns out to be necessary anyway
2 because there are going to be post-confirmation fees, that
3 satisfies 943(b)(3). Yes?

4 MR. BENNETT: Absolutely correct, yes.

5 THE COURT: So you have no objection to that here?

6 MR. BENNETT: No.

7 THE COURT: In fact, you support that. Okay.

8 MR. BENNETT: Correct.

9 THE COURT: Here's my problem with giving conclusive
10 weight to the reasonableness determinations by the fee
11 examiner. His review of fees, as you have pointed out, is
12 based strictly on the information that was provided to him by
13 the professionals. Is that fair to say?

14 MR. BENNETT: I don't think that's fair to say. My
15 impression is is that he's aware of what's going on in this
16 case and is aware of what the docket is in this case, and
17 I --

18 THE COURT: Okay. And that's a fair qualification
19 on what I said, but where I was going was in the context of
20 what happened in mediation, confidentiality would prohibit
21 him from knowing any of that. Yes?

22 MR. BENNETT: That is true. He certainly knows how
23 many mediation sessions there were, and someone counted I
24 think 150.

25 THE COURT: Really?

1 MR. BENNETT: No kidding. There were some -- I mean
2 it may be that they counted some multiple --

3 THE COURT: All right.

4 MR. BENNETT: -- tracks as multiple sessions, but I
5 did see that number. He certainly understood that that was
6 going on, and he certainly understands, you know, how many
7 people were at which one and each one.

8 THE COURT: But not to say this happened, but if,
9 for example, one party or another unreasonably extended the
10 mediation, wouldn't that have a potential impact on
11 reasonableness of fees?

12 MR. BENNETT: I suppose in a perfect world it would.
13 I don't quite know how to adjudicate that, and I agree with
14 you that it's unlikely that the fee examiner would have found
15 out about that, but I do agree that --

16 THE COURT: I don't want to say that happened
17 because I don't know. Unfortunately, I am subject to
18 mediation confidentiality, meaning I've excluded myself. So
19 what I'm thinking about is after the plan becomes effective
20 because I don't want you all to have to worry about fees in
21 the meantime, referring this back to Judge Rosen for
22 mediation to see if everyone can agree upon what reasonable
23 fees are and then if not engage in some kind of litigation
24 process.

25 MR. BENNETT: I certainly don't have any problem

1 with trying to iron out whatever difficulties there might be
2 in mediation before a litigation process. I think a
3 litigation process over fees at the end of this case would be
4 a very unfortunate result, particularly in light of the
5 overall economic success of this enterprise.

6 THE COURT: Now, of course, I have to say on the
7 record here that no one should interpret the conversation
8 that we are having here as any indication that the Court will
9 actually confirm the plan.

10 MR. BENNETT: Okay. I'm aware of that.

11 THE COURT: Yet to be decided.

12 MR. BENNETT: On feasibility -- and I think this is
13 the last topic I have to cover -- as recognized, I think, by
14 your Honor, by the Court's expert, and by I think everyone in
15 the courtroom, the feasibility test is a prediction about the
16 future. Cases recognize that predictions about the future
17 are probabilistic determinations. They're not certainties.
18 And it's about demonstrating -- in my words, slightly
19 different than the Court's expert's words, it's demonstrating
20 that a successful rehabilitation of the city is more likely
21 than not. In a case like the city's where we began with
22 service insolvency in a downward spiral, the test has to have
23 two basic dimensions. The first, which is the most common
24 and the one we expect, which is is it likely that the city
25 will be able to perform its adjusted obligations, and the

1 second is is it likely that the city will successfully
2 rehabilitate itself and ultimately provide adequate services
3 to its residents. You need both. The city, your Honor, has
4 demonstrated that the plan is feasible on the first test.
5 The basic evidence of the city's ability to meet its adjusted
6 obligations is its projections. You've heard testimony from
7 many sources that the projections were reasonably prepared or
8 based upon reasonable assumptions and are arithmetically
9 correct. The most important witnesses in that area are
10 Mr. Malhotra and Ms. Kopacz. The projections show that the
11 city can meet its adjusted obligations based upon assumptions
12 that may be conservative in some areas. What I'm referring
13 to is some of the revenue projections were described to your
14 Honor as conservative. But just as Mayor Duggan said, there
15 are some risks he signed up for when he ran for mayor, and
16 there are some risks that every city must deal with whether
17 it likes it or not. Most prominent in this category, of
18 course, was another shock to the macro economy along the
19 lines of the great recession. It would be a really bad thing
20 if that happened later this year or next.

21 I'll incorporate here and not say it again what I
22 said about skinniness, that the fact that the deals that were
23 reached with creditors had the result of leaving the city
24 with just about enough to accomplish its principal objectives
25 through reinvestment and service improvement but did not

1 create an overwhelming margin is the result you should
2 exactly expect from a largely consensual plan. That's how
3 they come out. Every side tries for as much as they can get
4 and leaves for the other side only what is perceived they
5 need. No one gets extra.

6 THE COURT: What would you, after sitting through
7 the trial, say are the top two or three risks to feasibility
8 that are within the city's control, not the possibility of
9 recession or calamity?

10 MR. BENNETT: Okay. I think Mr. -- you asked the
11 question of Mr. Malhotra. I thought he gave a good answer
12 about the ones, but he focused on ones that are outside its
13 control. I think within its control everyone recognizes that
14 there has to be flexibility in implementing the RRI's going
15 forward and that it's impossible sitting here in -- sitting
16 here in 2014 to decide exactly how monies to be appropriated
17 in like 2018 or --

18 THE COURT: Right.

19 MR. BENNETT: -- 2019 should be spent. And by the
20 way, it's -- I know that your Honor -- I certainly have
21 confidence in Mayor Duggan and his administration, all the
22 people he's brought on board. It's a very impressive group.
23 We don't know how long they're going to stay, and so we have
24 to make guesses about who will be there in the future. And
25 so I would say the most important, you know, risks that are

1 controllable are the risks of sticking with the plan and
2 making -- using the money -- you know, huge amount of budget
3 surpluses that are projected and earmarked, and the only
4 reason they're justifiable is they're earmarked for critical
5 investments in critical areas to summarize it as succinctly
6 as I possibly can. And to the extent that they're redeployed
7 or adjusted in any way, it's got to stay for that, use for
8 critical purposes in critical areas, which may evolve over
9 time to a degree, but what we don't need is the use of that
10 money for other purposes that someone might decide is
11 politically more expedient.

12 THE COURT: Such as?

13 MR. BENNETT: Who knows? I used the example at the
14 eligibility hearing about gold-plated faucets in the
15 executive washrooms. I don't want to draw exactly where the
16 line is and put one thing on the other. I think we know what
17 wasteful spending that does not advance the ball for the city
18 looks like that all of us can come up with examples. There
19 is, though -- I mean I heard and your Honor heard the fight
20 over whether -- opening parks before there were settlements.
21 There was a fight over is parks on the list of things that
22 are essential, so essential that they belonged in the RRI's,
23 and you saw there was a debate about that. Frankly, that
24 there was is incredibly healthy as opposed to that there not
25 be a debate about something like that, and very clearly at

1 the end of the day the decision was made, yes, parks matter.
2 It's about quality of life in the city. It is, as I have
3 defined it, back to the department store analogy, yes, people
4 care about whether there's a park around the corner. I did
5 when I bought a house and had young children. It matters
6 less now, but it is a -- so I don't know that we're ever
7 going to be able to define the categories of permissible RRI
8 expenditures, particularly as you go out, or permissible
9 substitutes. I will say they're something that the city
10 shouldn't ever let happen again, and I think all of us will
11 agree on them. The deferral of expenditures on management
12 information systems cannot happen again. The extent to which
13 that creates costs and ripples through the rest of the fabric
14 can't be overstated. I've been closer to it than your Honor,
15 but it is a huge problem, and series of costs upon costs upon
16 costs were created because that was allowed to occur. And
17 deferring capital projects generally because capital projects
18 maybe don't create votes right away and are, you know, longer
19 term benefit, that, again, at some point the costs come
20 cascading upon you. They have certainly cascaded upon the
21 city, and that's what drives the 1.7 billion number to be as
22 big as it is.

23 I don't know what other advice to give, but I do say
24 that the worst thing that could possibly happen for the
25 city -- and I don't know that it would get another chance --

1 is if the \$1.7 billion is misused or perceived to be misused.
2 Either would be an enormous problem.

3 THE COURT: What can we do to assure, as best we
4 can, that the city sticks to its commitments over the next
5 ten, twenty, thirty, forty years in regard to pension
6 funding?

7 MR. BENNETT: I think -- I actually think I gave you
8 that answer in response to another question, which is that it
9 has to be on the represented employee's agenda to assure
10 appropriate funding. They are the only people at the end of
11 the day who are going to be -- not the only, but they're
12 going to be an important player in this. I think all of
13 the --

14 THE COURT: Well, what role could the Financial
15 Review Commission play on this specific question?

16 MR. BENNETT: The Financial Review Commission,
17 frankly, is going to play a role on all of these questions
18 because I think the Financial Review Commission is going to
19 understand -- and if they read the transcript, for whatever
20 it's worth, they'll hear my view about it -- that the proper
21 use of the 1.7 billion, the proper deployment of that has got
22 to be an incredibly high priority. Also, not allowing the
23 pension situation to get out of hand again has got to be an
24 incredible priority given the amount of work it took to put
25 it back together and get it on a decent path, but I will say,

1 in addition to the Financial Review Commission -- and I
2 believe that this is a national point, not just a local
3 point -- the labor organizations have to put pension funding
4 high on their bargaining list, and then it'll happen. I'm
5 not saying they won't have to give up other things for it,
6 but it'll happen if it's high on labor's bargaining list.

7 Moving on, so I am not surprised that it's skinny.
8 I don't think we have any expectations that would be any
9 different. I think the expert's views that, yes, it may be
10 skinny, but more likely than not the city can perform its
11 obligations under the plan is the right answer. The city's
12 professionals get to the same place as well. They've so
13 testified.

14 The second part of the test is about whether the
15 city will be able to deliver adequate services, and your
16 Honor advertently or inadvertently managed to create a system
17 where that got tested effectively three times. So, first,
18 when Conway & MacKenzie did the initial buildup supervised by
19 Mr. Orr -- and a lot of other people had input as well -- you
20 got the first draft effectively or the first version of the
21 RRRs. You know from the testimony that the mayor got
22 involved a little bit at the beginning, but then when your
23 Honor transmitted through us to the mayor that he was going
24 to have to testify concerning the viability of the plan, he
25 did what you would exactly expect him to do. He went to each

1 and every department, made them look at the RRRs again
2 because they'd all seen them as part of the process of
3 building them and made them say in writing --

4 THE COURT: That's RRI?

5 MR. BENNETT: Sorry. Sorry. RRI's again and made
6 each and every one of them write a memo and put it in
7 writing, and all those memos are in evidence. And they had
8 different kinds of reservations about different things, but
9 the sum and substance of all of them are, yes, there's enough
10 money to cover the things that we need to cover here, and,
11 yes, we can bring our services up to a much better level if
12 we have this money. By the way, interestingly, there was
13 some evidence that at the end of the day even with the RRRs
14 there will be progress but maybe not get all the way to the
15 finish line, and I know that sticking in my mind is the fire
16 commissioner's testimony where he basically said that the --
17 that his RRI's and the budget improvements that he was going
18 to get were going to get him most of the way there or going
19 to get him a long distance to it, but he didn't think it
20 would get him where he really wanted to be, and that,
21 unfortunately, may be true, but I'm not quite sure how it
22 would be possible to get any more in light of the
23 circumstances of this case and, again, the overall economic
24 results. At any rate, that was the second test.

25 And then when your Honor engaged its own expert, the

1 Court's own expert, Ms. Kopacz, she did a separate review
2 certainly relying on the two previously mentioned sources and
3 came to the similar conclusion that the RRI's are going to
4 work.

5 Now, that's the objective review. The next part is
6 a little bit more subjective, which is looking forward to see
7 about implementation, which was the subject of our discussion
8 a few minutes ago, and, again, we don't know who's going to
9 be here five years from now, but we know the team we have
10 now, and through the efforts I think of Mr. Orr at the
11 beginning and Mayor Duggan following, you have had a
12 significant infusion of human talent into the city, and there
13 are a number of examples. And by leaving someone out I don't
14 mean to denigrate them in any way, but you heard from John
15 Hill; Beth Niblock, the MIS person; Fire Commissioner
16 Jenkins; Police Chief Craig. And I think you heard people
17 who are -- understand their business, understand what really
18 is going on in the City of Detroit and aren't misleading
19 themselves about the challenges ahead. They understand what
20 they are, and they seem and demonstrated in their testimony
21 to be very equipped to deal with them.

22 So I think Mayor Duggan, of course -- I said this
23 before -- recognizes that they're nowhere near done. You're
24 only ten percent of the way there. But I think you saw
25 commitment from the mayor. You saw commitment from the city

1 council president. You saw commitment from their staff, and
2 I think you have seen ample evidence that you've got a good
3 team. The city has a good team. The city has enough
4 resources, and there is a likelihood that they will be able
5 to address the problems of the city and improve conditions
6 here. Again, it's just a reflection of reality that there is
7 a need for some flexibility in how these things are going to
8 be carried out. After all, things will not turn out as
9 predicted, at least not in year 40.

10 I think that this is the right place to conclude. I
11 said at the beginning that the city had already achieved some
12 pretty impressive things and that it had a consensual plan.
13 It really makes genuinely radical adjustments, ought to
14 create vast improvement in the city, and did so in record
15 time. It is for your Honor to take the next big step and
16 confirm this plan and enable it go effective. I think I said
17 before we ask that you rule as soon as possible because we
18 would like to achieve an effective date before Thanksgiving
19 if we possibly can. We know you have a lot of work to do.

20 The emergency manager and his professionals are
21 keenly aware that we are leaving the city long before the
22 hard work necessary to complete the recovery is done. We
23 believe we have left adequate resources, a viable financial
24 structure, and a good plan in place. We are confident that
25 Mayor Duggan, the city council, city management, city

1 employees are up to this task. It's their turn now, and we
2 wish them well.

3 One last point. This is probably not the last time
4 I will have to speak. I may have to reply to some things
5 later, but I expect to be rushed, which I have been before in
6 those circumstances, and so I have one more important piece
7 of business to attend to. It is certainly true that many
8 people on my side of the courtroom and others not here have
9 worked very hard to get here today, and I include the
10 mediators in that. They're obviously, you know, not here
11 either. But I'm also reasonably sure that your Honor and
12 your staff, the court staff more generally, including the
13 marshals, have worked at least as hard as we have and
14 sometimes harder. On behalf of the city and the emergency
15 manager and its professionals, we acknowledge your
16 contribution to this great effort and to this great city, and
17 we thank you. We also appreciate the hospitality of the
18 usual occupants of this building and apologize for making
19 noise in the halls and any other inconvenience we may have
20 caused.

21 For myself, I just want to say I will come back to
22 Detroit as a tourist. In all the time I've been here, I
23 haven't yet had the chance to visit the Detroit Institute of
24 Arts. I'm not in a rush. I understand the DIA will be here
25 for a long time. Happy to answer any questions.

1 THE COURT: Well, you are welcome, and on behalf of
2 the occupants of the building, we accept your apology.

3 MR. BENNETT: Thank you.

4 THE COURT: Before we proceed, Mr. Cullen, Mr. Orr,
5 if the plan is confirmed, what can you tell me about when you
6 foresee the effective date?

7 MR. ORR: Your Honor, I would like to consult, but
8 the reason we say before Thanksgiving, as your Honor is
9 aware, a lot of the financial community and capital markets
10 start to spread apart from the Thanksgiving to the New Year's
11 holidays, so we're trying to focus on a date before
12 Thanksgiving, and that is why. Probably at least a few days
13 before that week would be helpful so that --

14 THE COURT: Okay.

15 MR. ORR: -- we can do some of the financings.

16 THE COURT: Okay.

17 MR. ORR: Thank you, your Honor.

18 THE COURT: All right. Who'd like to address the
19 Court next?

20 MR. HOWELL: Good afternoon, your Honor. Seven G.
21 Howell, Dickinson Wright, special assistant attorney general
22 appearing on behalf of the State of Michigan. Your Honor,
23 with me today are Matthew Schneider, chief legal counsel to
24 Attorney General Bill Schuette, and also in the courtroom is
25 Representative John Walsh, speaker pro tem of the House, and

1 the co-chair of the ad hoc committee for Detroit's recovery.
2 I will try to be considerably briefer than Mr. --

3 THE COURT: Before you proceed, would you identify
4 yourselves by either standing or raising your hands?
5 Welcome, gentlemen.

6 MR. HOWELL: I will be much briefer than
7 Mr. Bennett. I assure you of that, your Honor.

8 THE COURT: Okay.

9 CLOSING ARGUMENT

10 MR. HOWELL: Your Honor, the state agrees with Mr.
11 Bennett's argument that the city has met its burden of
12 establishing that the plan satisfies the requirements of
13 Sections 1129 and 943 of the Bankruptcy Code and should be
14 confirmed. Particularly, the state has reviewed the plan and
15 believes that nothing in state law would prevent it from
16 being carried out and carried out successfully. The state's
17 role in the case, however, is not to wade into the thick of
18 every one of the legal issues that must be decided by this
19 Court to reach that conclusion. The state's role has been to
20 provide assistance in the effort to restructure and adjust
21 the city's debt in this Chapter 9 case so that the city may
22 succeed and one day flourish again.

23 As the Court recognized in its eligibility opinion,
24 the city had been facing financial and operational struggles
25 for years prior to the filing of this Chapter 9. In 2011 the

1 governor appointed a financial review team for the city.
2 Financial review team ultimately made a finding of severe
3 financial distress, and, as a result, a financial stability
4 agreement was entered into known as the consent agreement.
5 When the city was unable to meet the requirements of the
6 consent agreement, a second review team was appointed and
7 found that a local government financial emergency existed.
8 Based upon that finding, the governor appointed Kevyn Orr as
9 emergency manager. Enormous amount of time, effort was put
10 into an attempt to address the challenges of the city before
11 any filing of bankruptcy. When those efforts proved
12 unsuccessful, the emergency manager recommended to the
13 governor the city be authorized to file for Chapter 9
14 protection. Governor Snyder accepted the recommendation and
15 authorized the filing of the Chapter 9 petition. In that
16 authorization, he said the only feasible path to ensuring the
17 city will be able to meet obligations in the future is to
18 have a successful restructuring via the bankruptcy process
19 that recognizes the fundamental importance of ensuring the
20 city can meet its basic obligations to its citizens. The
21 Court similarly noted in the eligibility opinion that, quote,
22 "in seeking Chapter 9 relief, the City not only reorganizes
23 its debt and enhances City services, but it creates an
24 opportunity for investments in the revitalization efforts for
25 the good of the residents of Detroit." Although the filing

1 of Chapter 9 has not been popular, there's no question it was
2 the right thing to do. And now with the case at the
3 confirmation stage, the path to the successful future of the
4 city has been charted. We ask that you look at the progress
5 made since the eligibility stage. What is encouraging at
6 this point of the case is that the overwhelming majority of
7 those who were objectors are now supporters, and we have
8 begun to see the improvements that have resulted from the
9 filing and the hard work of all concerned. In its
10 eligibility opinion, the Court found the city's service
11 delivery insolvency to be, quote, "strikingly disturbing,"
12 close quote, but in this confirmation hearing, many of the
13 city's witnesses have since testified to the strides the city
14 has made in improving services to its residents.

15 Chief Craig testified that the crime rate has
16 dropped. The police response time improved from 58 minutes
17 to 21 minutes, and the clearance rate for homicides has been
18 improved from 11 percent to 72 percent. Commissioner Jenkins
19 testified that the fire department has now over 40 ambulances
20 with 20 EMS units running daily on average when before it had
21 only 4 working ambulances and that fire and EMS response
22 times have improved. Mayor Duggan testified that blight is
23 being attacked with the city auctioning and selling houses
24 every day. Those houses that are beyond renovation and sale
25 are being demolished at the rate of 200 per week. The

1 streetlights are coming on, the trash being picked up. But
2 while the signs of the recovery are all around us, it is
3 still a fragile recovery. It has, in part, depended upon the
4 cash flow impact of the Chapter 9 filing and the quality of
5 life financing made possible by the bankruptcy.

6 The continuation of this upward trajectory depends
7 on confirming this plan, continuing to implement the
8 reinvestment and revitalization initiatives, ensuring
9 Detroit's neighborhoods and downtown core continue to see
10 better services, and building upon the fiscal discipline
11 implemented to date. While the witnesses' testimony about
12 the improvements is encouraging, the city's service delivery
13 still falls well below national averages, but make no mistake
14 about it, the alternative to moving forward with the plan of
15 adjustment would be disastrous. We cannot allow the city to
16 revert and fall back into the downward spiral.

17 In reaching its decision whether to confirm the
18 city's plan of adjustment, the Court must answer the question
19 of whether the plan offers the better alternative for city's
20 creditors, residents, retirees, and active employees. The
21 city has presented the Court with evidence that the answer to
22 this question is a resounding yes and that the alternatives
23 outside of this Chapter 9 are not viable. As the Court in
24 the Corcoran Irrigation District case stated, quote, "We must
25 avoid replacing reality with fancy," such as suggesting that

1 the DIA land and building without the art are worth \$200
2 million or that judgment levy taxes should be imposed on the
3 city's residents when Ms. Sallee of E&Y testified that the
4 city's property taxes are the highest in the state and the
5 collection rate is just 50 percent or that the city could
6 satisfy judgments through the issuance of judgment bonds that
7 would result from the race to the courthouse that most
8 assuredly would occur if this plan is not confirmed. The
9 Court recognized in its eligibility opinion that the city was
10 unable to satisfy its crippling debt prior to this Chapter 9
11 case, and unless the city is authorized to adjust its debts
12 through confirmation of its plan, nothing will have changed
13 financially since the Court issued that eligibility opinion
14 in December of 2013. In fact, your Honor, the Court heard
15 testimony from Mr. Malhotra and Mr. Hill that if the city's
16 debts are not adjusted and the city is required to pay its
17 existing debt service and legacy costs, the city would
18 experience a deficit of \$4 billion over the next ten-year
19 period, and this is without any expenditures for the
20 reinvestment initiatives that are so desperately needed to
21 help the city avoid -- halt the city's downward spiral and
22 restore to it financial and operational health.

23 This plan should also be confirmed because it
24 represents a rare opportunity to leverage funds to which the
25 city would not otherwise have access. State of Michigan has

1 agreed to contribute \$194.8 million, which is the present
2 value of 350 million, over 20 years to the two pension funds
3 to mitigate the reductions in the pension benefits of the
4 city's retirees, both uniform and nonuniform, that would
5 otherwise have been necessary. As part of the grand bargain,
6 the state contribution is combined with the generous
7 contributions of the participating foundations and the DIA in
8 an amount of at least 366 million and \$100 million
9 respectively, each payable over 20 years. If this plan is
10 not confirmed, that rare opportunity will be lost.

11 There are, understandably, conditions to the state
12 contribution, including the condition that holders of the
13 pension claims release the state from specific claims whether
14 or not such holders vote in favor of the plan. Although the
15 state believes there's no legal merit to claims against the
16 state by the holders of pension claims, the state sees real
17 value to preventing even meritless lawsuits by holders of
18 pension claims. At the same time, it would be untenable to
19 ask the state to voluntarily contribute the cash equivalent
20 of \$350 million over 20 years and expect that the group of
21 people benefitting from those funds would be permitted to sue
22 the state afterward.

23 Your Honor, no one can question that unusual
24 circumstances exist in this Chapter 9 case to justify the
25 grant of the release requested. First, the foundation of

1 Chapter 9 is that governments, unlike companies, must
2 continue to exist and be able to provide the health, safety,
3 and welfare of their residents. This is the largest Chapter
4 9 in the history of the United States involving a city that
5 is service delivery insolvent to the point that the health,
6 safety, and welfare of the people that live, work, and play
7 in Detroit was at risk. The very real prospect of even more
8 significant cuts in pension benefits exist absent
9 confirmation. These facts and circumstances that exist in
10 the City of Detroit's Chapter 9 case, among others, are
11 vastly different from and, therefore, warrant a different
12 approach from those applied in Chapter 11 mass tort cases and
13 securities class actions. In this case, the release should
14 be granted because, first, the state is contributing
15 substantial funds to the pension systems for the benefit of
16 the parties from whom a release is sought. Second, the
17 release is essential to confirmation of the plan, and, third,
18 the impacted classes have overwhelming voted to accept the
19 plan.

20 Your Honor, this plan will succeed because the
21 foundation of cooperation at its heart and its recognition of
22 the needs of the citizens of Detroit is the only way to begin
23 and continue rebuilding the city. One great example of
24 cooperation is evidenced by the water and sewer deal. After
25 over four decades of trying, there will now be a regional

1 water and sewer system and rebuilding the infrastructure that
2 40 percent of the state relies on, none more than the
3 residents of the City of Detroit, has been made a priority.
4 But it is easy to think of example after example of the new
5 spirit of cooperation. There's the decision by the city
6 council, the mayor, and the emergency manager to conclude
7 this case in a cooperative way and find a governance
8 compromise. There is the new legislation related to this
9 bankruptcy whether involving pension structures or post-
10 bankruptcy governance were resolved in a bipartisan manner
11 and working across geographic and party lines during an
12 election year. Mayor Duggan and Council President Brenda
13 Jones traveled to Lansing and sat down with the legislative
14 leaders and members of the governor's team to address
15 concerns regarding the legislation. These discussions
16 resulted in negotiated changes to the Michigan Financial
17 Review Commission Act, which earned overwhelming legislative
18 support along with the support of city officials, as
19 evidenced in Mayor Duggan's trial testimony, but this Court
20 does not have to simply hope cooperation will continue to
21 make this plan work. You can have confidence that there are
22 safeguards in place to help the city succeed. As Mr. Stibitz
23 testified, there will be a Financial Review Commission in
24 place to provide vital safeguards under the Michigan
25 Financial Review Commission Act, including, among others,

1 meaningful reporting requirements, requirements for specific
2 certifications that projections and balanced budgets are
3 prepared and adhered to and that the terms of the plan are
4 complied with and review and approval by the commission of
5 the proposed issuance of debt by the city, contracts over a
6 specified dollar amount, and collective bargaining
7 agreements. There's the establishment of the chief financial
8 officer position and the commission's involvement in the
9 hiring, retention, and discharge of the CFO and the ability
10 of the Financial Review Commission to act if the city fails
11 to comply with the statute or the plan.

12 Your Honor, as these examples highlight, from the
13 very beginning there has been an awareness of the importance
14 of what this bankruptcy case is about, a certain weight and
15 responsibility we all carry to get this right. We may never
16 again have an opportunity to do something this important for
17 our community. In fact, we may only get this one shot at it.

18 Your Honor, let me close by saying that this
19 bankruptcy has presented an unprecedented opportunity and
20 forum to exchange views, to debate the issues, consider the
21 alternatives, and come to a consensus on a broad range of
22 extremely difficult challenges by compromising for the
23 greater good of the city, the metropolitan Detroit area, and
24 the state. There have been a lot of painful decisions made
25 by the parties involved in this case, none more than by the

1 pensioners, but those painful decisions are why we have a
2 feeling of hope today for the City of Detroit. The spirit of
3 compromise has been reflected in the bipartisan state
4 legislation embodying the grand bargain, the tough decision
5 by pensioners to support the plan of adjustment in large
6 numbers, the cooperation among Mayor Duggan, the city
7 council, and the emergency manager, between the city and the
8 state with the support of the unions, the counties, and the
9 mayor creditors in the case. As Mayor Duggan testified,
10 quote, "There is a feeling of hope in the city. There is a
11 feeling that something good is happening."

12 Your Honor, there is a new spirit of Detroit, a
13 spirit of cooperation. With the confirmation of the city's
14 plan of adjustment, this spirit will receive a very powerful
15 boost. Even the creditors who fought the longest against
16 this plan are now literally invested in its redevelopment and
17 its success, but this new spirit of Detroit must be nurtured
18 and built upon. Every one of us must embrace the spirit and
19 remain committed to the revitalization of Detroit. If that
20 is done, the future of Detroit and of Michigan will be
21 bright.

22 Your Honor, this plan is in the best interest of
23 creditors as well as the residents of the City of Detroit,
24 the greater Detroit area, and the State of Michigan. The
25 State of Michigan strongly supports the city's plan of

1 adjustment and respectfully requests that this Court confirm
2 the plan as requested by the city.

3 Your Honor, before I finish, I, too, would like to
4 commend the Court and the staff for the patience and hard
5 work on behalf of the state and for all the parties in the
6 case because there has truly been a spirit of cooperation and
7 a feeling that this was a tough job but one that we all took
8 very seriously. This Court did, the mediators did, the
9 parties did, and the result reflects that. Thank you, your
10 Honor. Appreciate your time.

11 THE COURT: You're welcome. And we will be in
12 recess now, please, until 3:05.

13 THE CLERK: All rise. Court is in recess.

14 (Recess at 2:49 p.m., until 3:05 p.m.)

15 THE CLERK: All rise. Court is in session. Please
16 be seated.

17 MR. MONTGOMERY: Good afternoon, your Honor.

18 THE COURT: Good afternoon. You may proceed, sir.

19 MR. MONTGOMERY: Thank you, your Honor. May I
20 approach the bench with three copies of the presentation?

21 THE COURT: Sure.

22 MR. MONTGOMERY: We'll be putting them up
23 electronically, but just in case.

24 THE COURT: Okay.

25 CLOSING ARGUMENT

1 MR. MONTGOMERY: Your Honor, Claude Montgomery,
2 Dentons US, LLP, for the Retiree Committee. I rise today to
3 support the city's eighth amended plan of adjustment. I
4 propose to spend some time speaking to these issues, your
5 Honor, today because I have known for some time that one
6 cannot presume how your Honor will rule. In fact, your Honor
7 has shown a remarkable ability to stick to the evidence no
8 matter how uncomfortable or inconvenient it is for the
9 parties who are presenting it, so I propose, if your Honor
10 will permit, to walk through the case that we think actually
11 supports the plan that the Retiree Committee endeavored to
12 negotiate, endeavored to support, endeavored to solicit
13 acceptances, and ultimately Classes 10, 11, and 12 voted in
14 favor.

15 Now, your Honor, this municipal reorganization from
16 our perspective was about two fundamental issues, which we
17 will describe. We will try to tell you what it is that we
18 said we would show. We will try to tell you what are the
19 obligations to be addressed under the POA from our
20 perspective, and then, most importantly, we will walk through
21 the settlements that are to be approved by the Court from the
22 Retiree Committee's perspective.

23 There is no doubt that this case was about offering
24 the citizens of Detroit a financial path for economic and
25 civic revitalization. There is also no doubt, unfortunately,

1 that it was all about shedding retiree debt that had been
2 accumulated over decades and that from a retiree perspective,
3 this municipal reorganization was trying to make the city and
4 state live up to its promises reflected in its Constitution,
5 its local ordinances, and the collective bargaining
6 agreements while at the same time endeavoring to participate
7 in the fabric of the city economic and its cultural life. We
8 said we would show you in our opening statements that the
9 settlements were within the range of reasonable and not
10 unfair to retirees or to financial creditors. We said we
11 would show you that the impact upon retirees was real and
12 that, in fact, the retirees were woven into the community.
13 The obligations to be addressed are, most importantly, the
14 defined benefit pension plan rights and obligations under
15 both the General Retirement System and the Police and Fire
16 Retirement System. There are the annuity savings fund
17 obligations that exist only under the General Retirement
18 System. There are, of course, healthcare, dental, and life
19 insurance benefits often referred to throughout the case as
20 OPEB or other post-employment benefits, and, finally, there
21 are death benefits provided pursuant to the terms of the
22 specific trust.

23 So the city gave you a chart of what the settlements
24 are. Our view of those settlements is slightly different.
25 Of course, the official request comes only from the city, but

1 we would start with asking you to approve the global Retiree
2 Committee settlement, which includes the pension settlement,
3 which can be found at Docket 4391 at 168, and the three OPEB
4 settlements, which can be found at Docket 4391 at 167. There
5 are association settlements, first and foremost, the RDPFFA
6 or the Retired Detroit Police and Fire Fighters Association
7 settlement, which provides for a separate PFRS VEBA. There
8 is the DRCEA or the Detroit Retired City Employees
9 Association settlement, which provides for a catastrophic
10 drug program under the GRS VEBA separately negotiated from
11 the other settlements. There is an RDPMA, Retired Detroit
12 Police Members Association, which provides for some temporary
13 special governance rules and the police and fire VEBA, and
14 then, of course, importantly, there is the Retirement Systems
15 settlement which from the committee's perspective most
16 importantly provides for a restoration mechanism, and then
17 there are settlements which help retirees with the
18 obligations that the plan proposes under the -- for the
19 benefit of retirees, the UTGO settlement, which provides
20 \$31.7 million for income stabilization program. It was
21 mandated by the state contribution agreement and is provided
22 principally in funding to Class 11. There's, of course, the
23 DIA, which is -- settlement, which is sometimes characterized
24 as the foundation or the grand bargain itself, which provides
25 466 million over 20 years to Classes 10 and 11, and in the

1 first 10 years it goes 164 million to Class 10 and 45 million
2 to Class 11. The state settlement itself, which is
3 critical -- neither the DIA settlement nor the retiree
4 settlement entered into by the committee could have been
5 possible without the state settlement. It provides \$195
6 million to Classes 10 and 11, and in -- it all coming in just
7 after the effective date. Class 10 gets 96 million of it.
8 Class 11 gets \$98.8 million of it. In addition, it provides
9 for an investment committee oversight, causes the release of
10 claims. In fact, the state, as you heard Mr. Howell say,
11 would not have put any money in, and, in fact, we, on behalf
12 of the retirees, would not have accepted the settlement were
13 the state not putting the money only in the pensions, which,
14 of course, would have required the release. It also causes
15 the relinquishment of pension clause challenges to the city
16 eligibility and plan treatment, all of which are still
17 pending. Then there's the Syncora settlement, which provides
18 \$11.3 million in new B notes to Class 12, and, importantly --
19 and I'll come back to this later -- as part of that
20 settlement, there was start-up funding that the mediators
21 helped bring to the Class 12 in order to achieve consent to
22 the Syncora settlement. The FGIC settlement --

23 THE COURT: What's the source of that funding?

24 MR. MONTGOMERY: The source of that funding is
25 threefold, your Honor. There are two foundations that are

1 putting in money, and what's called the employee benefits
2 board, which is a separate trust, also called the rate
3 stabilization board, is putting up \$8 million to aid that
4 process.

5 THE COURT: Does this exhibit that you have
6 identified here, 790 --

7 MR. MONTGOMERY: Yes.

8 THE COURT: -- identify those sources and amounts?

9 MR. MONTGOMERY: It does, your Honor.

10 THE COURT: Okay.

11 MR. MONTGOMERY: It's a city exhibit. Now, we say
12 that when you're trying -- when this Court is looking at the
13 totality of whether or not to affirm the city's request for
14 confirmation, good faith under 1129(a) and good faith under
15 943(b)(1) sort of overrides everything. We think
16 understanding the city's transformation on the question of
17 good faith and the manner in which it was applied is critical
18 to understanding. Why do we say that? Because, as your
19 Honor found at the outset of the case, the debtor did not
20 negotiate with its creditors in good faith. You found that
21 in the eligibility opinion. The lack of good faith on the
22 part of the city was met with unforgiving -- and this is the
23 only way to characterize it gently -- retiree and active
24 employee hostility because of the city's effort to cut
25 pensions.

1 We, on behalf of the retirees, said the city was
2 ignoring explicit and specific protections provided under the
3 Michigan Constitution. Your Honor is quite familiar with
4 Article IX, Section 24, the pensions clause. The city took
5 this approach at the beginning to cease all future funding
6 for the pension plans. It was basically a defunding
7 proposal. It offered what your Honor found to be a somewhat
8 problematic offer for a pro rata portion of a \$2 billion
9 nonrecoursed interest only note with what we thought was an
10 illusory upside with a strange Dutch auction feature, if your
11 Honor will recall, that required the creditors to bid against
12 themselves to actually get the cash. Not only did the city
13 make that offer for pension promises, but that was the
14 same -- excuse me -- it made it for the benefits on the
15 healthcare side as well. It would have yielded to or
16 resulted in massive pension cuts and in a complete
17 elimination of healthcare obligations.

18 Now, what changed? Well, today the city has
19 proposed to fund all of the downward adjusted benefits. That
20 is very important. There could have been no deal with
21 retirees without that promise, and how is that promise
22 manifested? Well, in the eighth amended plan, it appears at
23 pages 45 and 47. It appears for each of the two pension
24 systems. After June 30, 2023, the city will contribute
25 sufficient funds required to pay each holder of a pension

1 claim his or her adjusted pension amount in accordance with
2 and as modified by the terms and conditions contained in the
3 plan. Those ellipses refer to the GRS or the PFRS plans,
4 your Honor.

5 It creates two VEBAs, another major change. Instead
6 of simply walking away from obligations, it created a
7 structure going forward, and under the plan there's \$492.7
8 million of B notes, those first budget notes that your Honor
9 referenced earlier, which go to fund the two trusts, one for
10 PFRS and one for GRS. The aggregate dollars involved are
11 substantially more than was being contemplated. The nominal
12 dollar value is \$959 million, and that can be seen from the
13 city's Exhibit 793 at page 3, your Honor. You can see the
14 math that's been pulled out there, \$493 million for the PFRS
15 VEBA and \$466 million for the GRS VEBA. So the bottom line
16 is that the city moved dramatically in the creation of a
17 structure to deal with retiree healthcare issues. So it
18 starts out dramatically cutting pensions, totally eliminating
19 healthcare obligations, ending up reducing benefits still on
20 the pension side but agreeing to fund them going forward and
21 putting in more cash.

22 Now, what changed, we say, was the demonstration of
23 courage and resolve and belief that nothing was impossible by
24 a host of individuals, your Honor, each acting individually
25 within their realm of appointed responsibilities. Two

1 serious strategic decisions made by the city and by the Court
2 at the beginning helped this process. The city's strategic
3 decision was to ask for the appointment of a Retiree
4 Committee. The U.S. Trustee appointed nine individuals
5 identified as Terri Renshaw, retired deputy corporation
6 counsel; Don Taylor, retired city patrol officer; Shirley
7 Lightsey, a retired DWSD director of HR; Ed McNeil, a retired
8 city arborist and an AFSCME special representative; Gail
9 Turner, retired city police inspector; Mike Karwoski, a
10 retired city lawyer; Gail Wilson, a retired city lawyer; Rob
11 Shinske, a DROP fire fighter; and the UAW as an institution
12 with two representatives.

13 The city asked for the Court to create it, and the
14 city and the Court agreed, but what did the Court do? Well,
15 the Court said this is all going to be subject to mediation.
16 Whether it was a brilliant move, a lucky move, whatever, it
17 turns out to have been a fantastic move for the sake of the
18 city. Chief Judge Rosen --

19 THE COURT: I'll take brilliant.

20 MR. MONTGOMERY: -- turned out to be a tireless
21 advocate for the city and a skilled facilitator between what
22 can only be called the city's seriously competing interests.
23 He, in turn, appointed two individuals from Detroit, Judge
24 Victoria Roberts and Eugene Driker, and from outside of
25 Detroit Bankruptcy Judge Elizabeth Perris and District Judge

1 Wiley Daniel. These individuals, from the perspective of the
2 retirees, participated not in eight settlements but in 14
3 settlements without which the plan really could not have
4 functioned well.

5 There's, of course, the grand bargain. There, of
6 course, is the global Retiree Committee settlement. There
7 is, of course, the financial creditors' settlements of the
8 UTGO, LTGO, Syncora, and FGIC, and the earliest, which was
9 the swap counterparty settlement. And then there are two
10 retiree association settlements, each of which are
11 independently listed. There are three collective bargaining
12 sets of agreements, one by AFSCME, one by the police unions,
13 and one by the fire fighters. Then there is the Retirement
14 Systems themselves that participated, and, finally, in order
15 to prevent the case from sort of going off the rails at the
16 very last second, there is the library settlement with the
17 UAW.

18 We said we would show you that we represent 23,000
19 people. Well, we have done that. Exhibit 1023 from the PFRS
20 valuation by Gabriel, Roeder shows 12,089, and a similar
21 exhibit, 1024, for GRS shows 11,539. That's how we get our
22 23,000 retirees, your Honor. We said that we would show that
23 there was an average of 20,000 a year in annual pension
24 benefits for GRS. How did we establish that? Well, in the
25 process of Ms. Nicholl testifying about the effects of COLA,

1 she told the Court that the starting point was the \$20,000
2 average benefit for GRS retirees. We told you that we would
3 show that the average PFRS individual made 30,000 a year in
4 pension, typically retired earlier due to mandatory
5 requirements, and did not receive Social Security benefits or
6 Social Security increases. How did we show that? Again, Ms.
7 Nicholl, through testimony regarding COLA, indicated that her
8 starting point was \$30,000 for PFRS.

9 We think we would -- we also told you that we would
10 show that the promises relating to these modest pensions and
11 healthcare benefits were clear and immutable. We start with
12 the immutable nature of Article IX, Section 24, the pension
13 clause. We then go to what makes it clear that there were
14 retiree benefits. Ms. Renshaw testified regarding -- it came
15 into evidence -- the Weiler consent judgment, which says the
16 city shall provide healthcare coverage pursuant to this
17 agreement to each class member for so long as the class
18 member is receiving a city pension. That's basically your
19 police and fire fighters who retired prior to 2007.

20 Contractual promises began for AFSCME and the
21 general service employees going back as early as 1971 where
22 Exhibit 1001 admitted into evidence shows that the city
23 agrees to pay the premium for regular retirees but not their
24 families. In the next collective bargaining agreement the
25 city agreed to pay half the premium for spouses as well as

1 regular retirees, so by 1974 it was absolutely clear that the
2 collective bargaining world had clear rights that
3 incorporated the city charter municipal code provisions for
4 such benefits.

5 Your Honor asked a number of questions today of the
6 city. I'm going to try to show you how we see how the
7 pension treatment is financially possible. We start with
8 something that was actually identified by Emergency Manager
9 Orr in his testimony. The existing assets of the Retirement
10 Systems and the assumed strong financial performance from
11 2013 and 2014 was a critical starting point. Milliman
12 indicated through its Exhibits 473 and 474 for PFRS and GRS
13 that in order for the frozen plan system to work, the assumed
14 rates for PFRS would be between 11-1/2 and 14 percent for
15 that two-year period, and for the GRS it would be 11 percent,
16 so step one is existing assets, strong early returns before
17 the plan becomes effective.

18 Second step was DWSD contributions totaling \$428.5
19 million over the next ten years. That was essentially the
20 liability of DWSD under its existing programs on accelerated
21 funding. Ms. Nicholl identified that as being her number and
22 her assessment of what the various sources of contributions
23 for the next ten years were in Exhibit 10100.

24 The next is noncity contributions to GRS totaling
25 175 million over the next ten years. There's a 20-year

1 promise, but important to getting the plan promise in place
2 from the city is what would the plans look like in ten years.
3 Well, to get there noncity contributions total \$175.5
4 million. Again, Ms. Nicholl identified the UTGO, the state,
5 and the DIA as those noncity contributions for a total with
6 DWSD of \$604 million in the first ten years.

7 Library, enterprise, and general fund reimbursements
8 total \$114.6 million. The same exhibit identifies those.
9 And then noncity contributions to PFRS -- all of the prior
10 contributions were for GRS -- \$260.7 million over the next
11 ten years. City promised to fund benefits, which we've
12 already discussed, and then, importantly -- and you cannot
13 lose -- we would ask the Court not to lose sight of the fact
14 that the GRS retiree losses occasioned by acceptance of the
15 plan are critical to the funding structure of these plans.
16 Every retiree suffers more than four-and-a-half-percent
17 reduction over their lifetime. Sixty percent suffer 15
18 percent or more. Ms. Nicholl testified to that and on
19 Exhibit 10107.

20 PFRS retiree losses occasioned by acceptance of the
21 plan, the total present value to the partial COLA reduction
22 is itself \$688 million, so any notion that there is a hundred
23 cent recovery here goes out the window once you understand
24 that retirees have to lose money over their lifetimes for
25 these plans to be feasible.

1 We also showed you that the impact of COLA for PFRS
2 varies dramatically by age. As you can see in 10112, if a
3 younger retiree at age 55 can lose as much as 15 percent, the
4 older retiree at age 90 could lose relatively little on a
5 compound COLA, and the answer for why is straightforward. If
6 you don't have very long to live, COLA doesn't mean very much
7 to you. If you have a long time to live, COLA means a lot to
8 you. Same is true with simple COLAs, your Honor.

9 Also important was another benefit loss, another
10 benefit expectation loss. GRS and PFRS active employees
11 accepted the frozen plans. Milliman calculated that those
12 values were \$95 million for the DGRS and \$55 million for the
13 PFRS. GRS and PFRS participants agreed to release state from
14 claims and the losses occasioned by Class 11 acceptance of
15 ASF recoupment from both active and retirees. Again, each of
16 these elements is necessary for the funding structure. This
17 chart that Ms. Nicholl developed shows the distribution of
18 ASF cuts -- recoupment cuts alone. Ignore COLA. Ignore the
19 four and a half percent. This exhibit, your Honor, shows
20 what recoupment means. There are 1,055 individuals whose ASF
21 recoupment is 15-1/2 percent, meaning that they're at the 20-
22 percent pain cap. Your Honor may recall testimony regarding
23 the pain cap. And at the other end, you have \$1,216 who lose
24 as little as three percent, meaning that their total losses
25 will be under seven and a half.

1 In real terms, the city's funding commitment we said
2 is absolute, but it depends on the 6.75 projection, which is
3 a negotiated number. It's a negotiated number because a
4 higher number meant less benefit cuts but greater city
5 susceptibility to financial risk. A lower number meant
6 greater cuts, and it also meant if there weren't greater
7 cuts, greater contributions being required from the city.
8 The 40-year projections that the debtor uses show that on a
9 nominal basis at 6.75 percent, a billion three is going to
10 PFRS and a billion eight, important foundation for the
11 pension plan treatment. As I've indicated, raising the
12 assumed rate of return lowers contributions, lowers
13 liabilities. Converse is also true.

14 Mr. Fornia agreed that a higher assumed rate of
15 return lowers projected contributions and liabilities. He
16 testified to that on the 14th of October. Your Honor may
17 recall that testimony.

18 Bottom line, if the 6.75 percent is exceeded, the
19 city will, in fact, have the ability to lower its future
20 projected contributions from the billion three and the
21 billion four that your Honor saw on the prior exhibit. If,
22 however, conversely, 6.75 is not achieved, the city will need
23 to raise its projected contributions.

24 THE COURT: Well, but that's true. Go back to the
25 prior slide if --

1 MR. MONTGOMERY: Yes, sir.

2 THE COURT: Can you get the button for that?

3 MR. MONTGOMERY: Yep.

4 THE COURT: The second bullet point from the bottom
5 only works to a certain extent because of restoration; right?

6 MR. MONTGOMERY: No. This is completely independent
7 of restoration, your Honor. The projections are not
8 dependent upon restoration. They are only dependent upon the
9 funds earning 6.75 percent, and the math of what the city has
10 to put in is the difference between the cuts, the 6.75, and
11 the contributions from other sources.

12 THE COURT: Well, but doesn't the city give away
13 some of the upside potential through restoration agreements?

14 MR. MONTGOMERY: If certain funding levels are
15 achieved -- I think it's 75 percent at 2023 and so forth up
16 to 45 percent, your Honor -- absolutely, but only on
17 investment returns. You cannot get restoration as a result
18 of simply contributing more money by the city or simply
19 meeting the 6.75 percent.

20 THE COURT: So I'm right that the city gives up some
21 of the upside potential in the market through restoration?

22 MR. MONTGOMERY: Oh, absolutely, your Honor.
23 Absolutely. And that was part of the basic understanding of
24 the parties that if the city, in fact, didn't need to ask for
25 these pension cuts --

1 THE COURT: So the assumed rate of return of 6.75
2 percent is a little bit illusory then, isn't it?

3 MR. MONTGOMERY: Not at all, your Honor, because the
4 funding structure runs off the math of 6.75 percent. If the
5 city yields more than 6.75 percent, it can only achieve --
6 or, rather, cause restoration if not only funding levels are
7 concerned but that the excess is actually available to
8 purchase future benefits. It's not a one year at a time
9 process. It's a look forward process. And not only does it
10 require the ability of the city --

11 THE COURT: Well, but answer this for me.

12 MR. MONTGOMERY: Sure.

13 THE COURT: Isn't it true that without restoration,
14 if we can create that universe for a second --

15 MR. MONTGOMERY: That hypothetical.

16 THE COURT: -- the city would be incurring less risk
17 regarding its future pending obligations?

18 MR. MONTGOMERY: Absolutely correct, your Honor, and
19 part of the drama, if you can well imagine, the drama over
20 whether or not the city's original 6.25 and 6.5 would be
21 acceptable or what you might expect what the Retiree
22 Committee and the other retiree groups were asking for, part
23 of the mix on how you yield up to 6.75 is this mix of give
24 and take on the city's future risks.

25 THE COURT: Um-hmm.

1 MR. MONTGOMERY: So your Honor is 100 percent
2 correct. In fact, your Honor, I was going to just tell you
3 what the connection between funding targets and restoration
4 was. Now I can skip it. The one area where there's not a
5 lot of room for, gee, couldn't the city do better --

6 THE COURT: Before we go to OPEB, though --

7 MR. MONTGOMERY: Sure.

8 THE COURT: -- I'd like to press you with the same
9 question that I pressed to Mr. Bennett, which is what is your
10 position on the percentage recovery for Classes 10 and 11?

11 MR. MONTGOMERY: Oh, your Honor, I am, for better or
12 for worse, much -- I'm sort of fixed by my own witness'
13 testimony. You'll recall Ms. Nicholl, and I actually have
14 that identified.

15 THE COURT: Is that a later slide? If it is --

16 MR. MONTGOMERY: Yes, it is.

17 THE COURT: -- we can put this off until you get
18 there. That's fine.

19 MR. MONTGOMERY: Yes. Absolutely.

20 THE COURT: Okay.

21 MR. MONTGOMERY: Every retiree is affected by OPEB
22 reductions, and there are a couple of ways -- three ways that
23 we suggest that you can sort of measure it without going into
24 the human by human story of the horror of losing medical
25 benefits. One, of course, is the claim value. We know that

1 the B notes on the basic deal was 450. It then evolved to
2 another 11 and then another 31.7, so the \$493 million is the
3 total take. The allowed claim is \$4.3 billion. The nominal
4 recovery -- and it's strictly nominal -- it has no present
5 value computations in there at all -- is 11.5 percent, your
6 Honor.

7 Second way of looking at it is to sort of think
8 about what it was going to cost the City of Detroit at
9 various points in time. You may recall that a lot of
10 emphasis was placed on how high the cost of OPEB was going to
11 get by 2023 and later. Well, the city put on testimony
12 through Exhibit 33 that in 2023 health benefits were going to
13 cost the city prebankruptcy \$234 million. 233.7 is the
14 number they used. And so if the annual payout on the B notes
15 at four percent is 19.7 -- and that's just the simple math of
16 four percent times the 493 -- the implied cost reduction for
17 the year 2023 is 92 percent. That's another way of sort of
18 looking -- the scale of what's happening to healthcare costs
19 for retirees.

20 The third way is, of course, that there is no cap
21 under the plan of adjustment for increased healthcare costs.
22 The retirees simply have to absorb it. There's no way around
23 it.

24 Third way is that the VEBAs themselves, these
25 creatures with \$493 million worth of notes, needed start-up

1 funding assistance. They couldn't actually get going without
2 contributions from third parties in the form of \$11-1/2
3 million plus acceleration on certain of the excess B notes.
4 That is what's known as a slender recovery if your basic
5 vehicle to provide some sort of healthcare protection needs
6 outside funding just to get started, which is what happened
7 here, your Honor. This is the chart that I said we -- the
8 city exhibit that shows what the start-up funding was. It's
9 the cutout from Exhibit 790.

10 THE COURT: Well, in the VEBAs has it been
11 determined how each VEBA will determine who gets what
12 benefits?

13 MR. MONTGOMERY: First, under the plan of adjustment
14 and the trust agreements, it's completely discretionary on
15 the part of the future retirees. There has been a basic
16 decision that the existing benefit structure for 2014 will be
17 continued in 2015 while the trustees try to figure out what
18 they're going to do going forward.

19 THE COURT: What will the cost of that be?

20 MR. MONTGOMERY: It should be roughly \$36 million.

21 THE COURT: Where will that come from?

22 MR. MONTGOMERY: It'll come from interest on the
23 notes plus the start-up funding plus it is likely that the
24 trustees will decide to sell some or all of the B notes to
25 the marketplace. They have to because otherwise there's not

1 enough cash to make it through the end of the first year,
2 and -- and your Honor will be familiar with this -- the
3 interest arbitrage is pretty critical to the long-run success
4 of the plans. If all you're going to do is gain four-percent
5 interest for the next 30 years, that is a pretty thin
6 opportunity for financial benefits, and so there's going to
7 be some, we are presuming -- our investment advisors have
8 told us -- everybody has kind of accepted the proposition
9 that you're going to have to try to get better than four
10 percent from the rest of the market, but whether it's going
11 to be four and a half or six or six and a half I have no way
12 of saying, your Honor.

13 THE COURT: Okay.

14 MR. MONTGOMERY: From our perspective, your Honor,
15 we ask you to think about the sum of the settlements as the
16 key to unfair discrimination. If every settlement is fair
17 and reasonable and the plan is unquestionably premised on
18 eight or fourteen fair and reasonable settlements, how can
19 the plan itself be unfair? That's the proposition we want to
20 work through with you, your Honor. The separate creditor
21 classification, of course, is permitted under U.S. Truck
22 based on the independent classifications -- or independent
23 interests of the creditors themselves, and the litigation
24 settlement's business justifications we assert will serve as
25 the business justifications for the class discrimination

1 under the plan of adjustment.

2 Now, what facts on discrimination were raised at
3 trial? First, the actual claim question, and this goes back
4 to -- your Honor, this is the slide I was going to try to
5 find. Ms. Nicholl testified that the allowed settlement
6 claims, which are the plan-based settlement claims, at 6.75
7 percent was \$1.9 billion for GRS and \$1.25 billion for PFRS.
8 She compared that, though, with her actual values, which she
9 said should be based on risk-free rates rather than the
10 negotiated 6.75 rate would have yielded claim values of three
11 and a half and 3.9. Your Honor says -- okay. So what's the
12 next step? The consideration provided by the city for
13 Classes 10 and 11 is far less than that which is described in
14 the disclosure statement because it includes the noncity
15 contributions. The city has acknowledged that in its
16 presentations today, and that's pretty straightforward.
17 Again, Ms. Nicholl showed you the value of the city
18 contributions, quite different than the total contributions
19 coming in from the plan, 750 and 361 for GRS and PFRS using
20 the 6.75 percent and a billion one and just under \$682
21 million for PFRS.

22 What happened to the discrimination? Well, between
23 Classes 7 and 9 on one hand and Classes 10 and 11, those were
24 resolved by settlement after all objections and the class
25 consents. Between 14 and 10 and 11, however, there appears

1 to be a lack of objections, but your Honor still has to make
2 the finding that it's not unfair. Again, we assert that
3 since the discrimination arises from the settlement of a
4 series of litigations and the discrimination is critical to
5 the survival of the city and resolves important
6 constitutional issues on appeal about which there was
7 arguably material doubt despite the clarity, the absolute
8 clarity of this Court's opinion in the eligibility, so how
9 does this actually shake out from our vantage point?

10 Again, the exclusion of noncity sources, we cite
11 these cases in our pretrial briefs. Recoveries requiring new
12 or creditor cash investments can also be excluded from the
13 recovery analysis. And so let's talk about the settlements
14 itself. Complexity, interest of creditors, arm's length
15 nature are three of the five central factors. We say these
16 standards overlap with Aztec. We say that in the
17 circumstances of the case, the litigation settlement
18 standards will yield a similar result under the Markell
19 theory because the presumption of unfairness could be
20 rebutted by necessity and nonbankruptcy differences. Outside
21 of Chapter 9, as your Honor has acknowledged or raised today,
22 the obligations of pension creditors are subject to pension
23 clause protection or as general trade or not.

24 What about basic reasonableness, arm's length and
25 good faith? Ms. Renshaw and Mr. Bloom both testified on this

1 question. The city actually cited Ms. Renshaw's testimony
2 and also cited Mr. Bloom's testimony. These are page
3 references if your Honor wants them for the record.

4 The retiree settlement ties to the city and its
5 active workers. Kevyn Orr indicated that. First he pointed
6 out that there were 9,000 city employees spread out over the
7 various departments. He then pointed out that 6,000 of them
8 were dedicated to public safety. The implication your Honor
9 is supposed to draw or may wish to draw from these facts is
10 that since it's unquestioned that public safety is a central
11 problem that this city faces, if your residents are afraid,
12 if your residents' property is not safe, it's very hard to
13 maintain a stable population. It's impossible to grow that
14 population. So anything that makes these service providers
15 have greater morale or be more involved in the city is
16 important, and Mr. Orr testified that in his dealings with
17 public safety employees, they brought up very strong concerns
18 about their pensions and particularly in the public safety
19 unions. There were concerns about retiree healthcare, but
20 those concerns were pretty strong throughout the whole labor
21 stack both on the civil -- that should be civil side -- and
22 on the public safety side, your Honor.

23 Mr. Bloom testified in a very comparable manner.
24 This is the citation that the city actually gave to you
25 earlier. This is the particular date referenced. It was the

1 committee's belief that active employees were concerned, and
2 we had employees who were putting forward that concern. He
3 was talking about the active union -- active and union
4 representation on our committee.

5 The integral nature of the retirees, this chart came
6 in in lieu of the testimony of Stu Wohl by agreement by all
7 sides. This shows that 73.5 percent of the retirees live in
8 the greater Detroit metro area and 85 percent -- or just
9 under 85 percent live in the State of Michigan itself.

10 Of course, one cannot lose sight that the pension
11 settlement is not just retirees. Classes 10 and 11 include
12 both active and retired employees and their beneficiaries.
13 The resolution of complex issues was obviously critical to
14 the OPEB resolution. You could not have gotten an OPEB deal
15 without a pension deal, and concessions from retirees were
16 the center of restructuring healthcare.

17 The critical nature of healthcare, again, came from
18 Mr. Orr. He testified on October 1 that 40 percent of the
19 city budget was projected to be 400 million roughly dedicated
20 to legacy expenses, both debt service and half of that to
21 100-plus was retiree health. We knew that at the current
22 rate of increase over the next nine years, legacy costs were
23 going to grow to 73 percent on average of the billion dollar
24 budget. That was a problem the emergency manager said was
25 critical to his resolution of these issues. Pension

1 settlement was critical to that. The only way for the
2 VEBAs -- excuse me -- for the retiree healthcare to work was
3 for there to be a fixed obligation of a fixed duration of a
4 known nature, and, as Mr. Bloom testified, in other words,
5 the city eventually provided to the two VEBAs notes,
6 financial instruments that had a fixed obligation, a fixed
7 interest rate, and a fixed period of payment. That defines
8 entirely the city's obligation on this benefit.

9 As is evident to your Honor, as you've heard the
10 testimony, you couldn't reach a pension settlement without a
11 compromise on the investment return assumption. It has an
12 impact on the sufficiency of both the ten-year and the forty-
13 year projections. Mr. Bowen testified to that. And he also
14 indicated the basic view that higher investment return
15 assumptions, ultimate benefits will be paid by the investment
16 return. In the short term, that depresses contribution
17 levels. And the converse was also true.

18 As a matter of actuarial practice, Ms. Nicholl
19 testified that it was appropriate for the parties to
20 negotiate a prescribed investment rate assumption to
21 determine both the level of benefit cuts upon retirees and
22 for funding, as she mentions, ASOP 4 in her testimony on
23 September 16. ASOP 4 specifically permits a governmental
24 entity to set a prescribed assumption. Committee Exhibit
25 10996 is the relevant language from ASOP 4, your Honor.

1 That 6.75 percent was a compromise not just on the
2 benefit reduction issue but on the question of what was the
3 claim worth since she testified that the actual claim should
4 be based on a risk-free discount rate. She gave that
5 testimony on September 16.

6 Your Honor has been very sensitive, and I just want
7 the record to reflect that the pension settlement also
8 required sensitivity to market volatility. Of course, the
9 largest cause of the Detroit Retirement Systems' underfunding
10 was the great recession, according to Cynthia Thomas. She
11 said that on October 15 as this being an example of the rare
12 circumstances would be the severe market downturn at the
13 beginning of the great recession, which caused significant
14 amount of asset losses in all pension plans across the
15 country.

16 Market volatility, however, was not restricted to
17 the events of 2008 and 2009, as your Honor well knows.
18 Exhibit 1017 was utilized in the testimony of Mr. Fornia. We
19 identified five different years from the period 2000 to 2013
20 which had either less than one percent or actually negative
21 returns. That is volatility by any definition.

22 Pension settlement required use of a liability cost
23 method. Ms. Nicholl testified that it's required by city
24 charter to use the EAN methodology. The effect of the
25 balance cap and the pain cap is also part of the

1 reasonably of the pension settlement. Again, this is the
2 chart you saw earlier regarding the distribution of ASF
3 recoupment. There is a lump sum payout alternative under the
4 eighth amended plan at Docket 8045 at pages 11 and 48. This
5 is where you can find it, your Honor. There's a maximum
6 payment limitation which can be found at Docket 8045 at 48.
7 The total ASF recoupment from the ASF distribution
8 recipients' monthly pension checks over time shall not exceed
9 the amount necessary to amortize the applicable annuity
10 savings fund excess amount at 6.75 percent. That language,
11 your Honor, is the language that was put in the plan to match
12 Mr. Moore's testimony and to answer your questions. But,
13 again, ASF recoupment itself is integral and a critical part
14 of the global retiree settlement under the plan of
15 adjustment. The global settlement simply doesn't work
16 without this feature. The math doesn't work. The concepts
17 don't work. The benefit structure doesn't work. Either
18 greater pension cuts would be required across the board or
19 the city would have to contribute more money. Those are the
20 only two possibilities. Seventy percent funding target is a
21 centerpiece of the city's willingness to contribute 70 --
22 contribute funds after 2023, and ASF is important to that.

23 We believe that the bankruptcy rules permit a
24 settlement. We believe it's consistent with Michigan law of
25 the exclusive benefit rule, and particularly by effectuating

1 a class settlement which minimizes across-the-board cuts,
2 settled costly litigation, and limits the downside risk to
3 each retiree, the essence of the exclusive benefit rule has
4 been achieved.

5 The settlement is necessary and critical to the
6 city's restructuring. The pension settlements fairly
7 distribute benefit losses among actives and retirees. The
8 OPEB settlement creates fixed obligations that assures the
9 city and retirees of some future healthcare benefit
10 protection. The release of the state in return for voluntary
11 contributions to the pension plan works for both the city and
12 for the retirees, and as a result, the Retiree Committee
13 requests the Court to exercise its discretion and approve the
14 city's eighth amended plan of adjustment.

15 At this moment, your Honor, I would like to do
16 better than engage in the formalities. Your Honor has heard
17 a number of issues in which my clients put forward in the
18 strongest possible terms factual and legal assertions that
19 your Honor often did not agree with, but there is no doubt
20 that as far as the evidence is concerned, your Honor took the
21 good with the bad and made rulings that we can only respect
22 and for which we thank you.

23 THE COURT: You're welcome.

24 CLOSING ARGUMENT

25 MR. GORDON: Good afternoon, your Honor. Robert

1 Gordon on behalf of the Detroit Retirement Systems. Your
2 Honor, I will be brief and will not be repeating as much as I
3 can avoid anything that has been said by Mr. Bennett or by
4 Mr. Montgomery. They have ably set forth many of the
5 important points.

6 Your Honor, this case obviously involves a complex
7 set of creditor classes, including multiple species of bond
8 and bond-related debt as well as pension and healthcare
9 claims and the legal rights asserted by these different
10 classes of creditors very significantly. Classes 10 and 11
11 under the city's eighth amended plan of adjustment comprise
12 the pension claims of the beneficiaries of each of the
13 Detroit Retirement Systems, the Police and Fire Retirement
14 System and the General Retirement System respectively. The
15 Retirement Systems' beneficiaries consisting of both active
16 and retired city employees are an integral part of the life
17 and fabric of the community, the community that is the City
18 of Detroit. In settling with holders of Class 10 and 11
19 pension claims under the plan, the holders have agreed, among
20 other things, to dismiss their pending claims and Sixth
21 Circuit appeals against the city relating to the state
22 Constitution's so-called pensions clause, and they have
23 agreed to release any related claims against the state under
24 the pensions clause. These causes of action involve claims
25 and arguments that only holders of Class 10 and 11 pension

1 claims can assert.

2 THE COURT: Slow down just a bit for me, please.

3 MR. GORDON: I shall, your Honor. Thank you. No
4 other creditor class has asserted or could assert any such
5 rights and arguments under the Michigan Constitution. These
6 causes of action, if successfully appealed by these
7 creditors, would result in either a dismissal of this entire
8 bankruptcy case or a requirement that these classes of claims
9 be paid in full under the plan. As such, these released
10 claims have a value that is significant and unique to these
11 classes. Mr. Bennett referred to Judge Klein's ruling in
12 Stockton recently as perhaps undermining that value, but I
13 would submit that that ruling was in a completely different
14 context starting with the fundamental fact that California --
15 the California Constitution does not have a pensions clause
16 at all.

17 In addition to the effective resolution of
18 litigation claims held by Classes 10 and 11 claimants, the
19 settlement of the pensions claims is supported by certain
20 economic considerations that we would submit go to the heart
21 of the issue of what is the business of a municipal debtor
22 and what does it mean to rehabilitate such a debtor. The
23 treatment of pension claims directly impacts active and
24 retired employees who are residents of the city. As such,
25 the business justification for providing a meaningful

1 recovery to these claimants is manifest. As the city has
2 alluded, the greater the impairment of pension claims, the
3 greater the demoralizing impact on the current workforce and
4 the greater the threat of defections. And it is generally
5 the case that the first to leave are those with the best
6 opportunities to switch employers; i.e., the best and
7 brightest of the class. That concern was echoed through the
8 testimony of Mayor Duggan, among others. Such talent drain
9 would run contrary to the goal of restoring the city's
10 ability to deliver a reasonable level of essential services
11 to its residents.

12 Moreover, if a portion of that resident population
13 is impoverished by operation of the plan, particularly when
14 one considers the double impact to thousands of retirees of
15 receiving both a pension cut and a drastic reduction in
16 healthcare benefits, this would also run contrary to the goal
17 of the city to create a vibrant community in which residents
18 maintain their homes and neighborhoods and can afford to
19 consume goods and services which, in turn, attracts new
20 business to the city.

21 Both the release of pending litigation and related
22 claims and the foregoing business or economic considerations
23 provide ample justification for the plan settlement of Class
24 10 and 11 pension claims. Moreover, the settlement is a fair
25 and appropriate one that properly balances the city's desire

1 to reduce its risk of future underfunding liability with the
2 desire to minimize any resulting reductions to pension
3 benefits. This was the subject of much lengthy negotiation
4 in mediation.

5 In addition, it should be noted that the settlement
6 includes the creation of new investment committees for each
7 of the Retirement Systems with substantial oversight and
8 control of investment-related decisions of the Systems, which
9 creates a structure that many view as reflecting best
10 practices in the pension industry and which should greatly
11 support any analysis as to the feasibility of a system's
12 investment performance on a go forward basis. And, as I can
13 personally attest and has been represented unequivocally to
14 the Court by parties in various pleadings and hearings, the
15 settlement of these claims, your Honor, was the product of
16 untold hours of arm's length intense negotiations that
17 included the sophisticated inputs of numerous lawyers,
18 financial advisors, and actuaries on behalf of the city, the
19 Retirement Systems, and the Retiree Committee.

20 Subsequent to the settlement of the pension claims,
21 the city reached settlements with numerous other classes of
22 creditors, including the UTGOs, the LTGOs, and the COPs
23 holders and their insurers. These settlements vary in their
24 structure and projected recoveries reflecting the differing
25 legal rights asserted by each creditor group and the city's

1 differing evaluation of those rights under the Bankruptcy
2 Code.

3 Notwithstanding the complexity of the city's
4 financial issues, somewhat miraculously a consensual plan is
5 now before the Court. A tremendous coalescence has occurred
6 through the dogged and courageously pragmatic efforts of a
7 vast number of parties. The list includes the retiree
8 community, including the Retirement Systems, the Retiree
9 Committee, and the retiree associations, the city's active
10 employees and their unions, the charitable foundations and
11 the DIA, the financial creditors, Governor Snyder, and the
12 state legislature, the counties, the emergency manager, Mayor
13 Duggan, Judge Rosen, Judge Roberts, Eugene "don't call me
14 judge" Driker, Judge Perris, Judge Daniel, Judge Coar, and,
15 indeed, this Court. The product of these efforts, a
16 consensual plan, is remarkable, and all of Michigan should be
17 proud.

18 We agree with Mr. Bennett that the plan provides the
19 city with the resources, both financial and operational, to
20 successfully revitalize. Therefore, it is our sincere hope
21 that the Court will issue an opinion confirming this plan and
22 continuing the positive momentum that this plan reflects for
23 the future of the city and the region. We do thank the
24 Court's staff and the marshal services for their tireless
25 efforts and their patience in facilitating this case.

1 But, finally, on behalf of the Detroit Retirement
2 Systems and personally, I thank the Court for its courage in
3 taking on this challenge, for its service and stewardship
4 throughout this case, putting aside that one little pension
5 clause ruling, and for your willingness to postpone your
6 Honor's well-deserved retirement. It has been an honor to
7 appear before you throughout this case and throughout the
8 years. Thank you, your Honor.

9 THE COURT: You're welcome, and thank you.

10 MR. GORDON: I must mention, by the way, though I
11 hate to mention it as late as the hour is getting, I do have
12 one very important housekeeping matter that I'd like to raise
13 with the Court when people are done with their closing
14 arguments, if I may.

15 THE COURT: Oh, sure.

16 MR. GORDON: Thank you, your Honor.

17 THE COURT: Yes. I have several myself. Who's
18 next? Yes, sir.

19 CLOSING ARGUMENT

20 MR. PLECHA: Good afternoon, your Honor. Ryan
21 Plecha of Lippitt O'Keefe Gornbein on behalf of the retiree
22 association parties. My comments today will be brief and in
23 favor of confirming the city's plan of adjustment.

24 Both my clients, the Detroit Retired City Employees
25 Association and the Retired Detroit Police and Fire Fighters

1 Association, have been actively involved in the bankruptcy
2 process from attending pre-petition presentations to
3 challenging the city's eligibility through trial and
4 appellate process, to participating in mediation, to reaching
5 a resolution with the city, and to ultimately promoting the
6 plan to their members, retirees, and to this Court.

7 I must thank the Court for ordering the mediation
8 process, which provided the environment for resolution. It
9 was only in this environment and many long hours of intense
10 negotiations that allowed the associations to be harbingers
11 of settlement and plan support. In that same vein, I must
12 also thank Chief Judge Rosen, Judge Roberts, and Eugene
13 Driker for their wisdom and tireless efforts in stewarding
14 the mediation process.

15 I must also note the courage and dedication of the
16 RDPFFA through its board and led by its president, Don
17 Taylor, along with the same resolve and efforts of the DRCEA
18 through its board under the guidance of its president,
19 Shirley Lightsey, in making the difficult choice to reach an
20 agreement with the city and to support the plan of
21 adjustment. This was no easy feat for obvious reasons, but
22 these retiree settlements and retiree plan support were
23 critical and acted as a catalyst to many other settlements.
24 Both the RDPFFA and the DRCEA were critical in creating
25 positive momentum towards resolution and, as Mr. Bennett

1 said, a parade of settlements. The DRCEA and the RDPFFA have
2 vocally supported the plan, testified to the House and Senate
3 committees in favor of the grand bargain legislation in
4 support of the plan in this case.

5 Detroit's retirees devoted their careers and their
6 lives to the city and now, as a class and as classes, have
7 agreed and voted to make one more sacrifice for the city they
8 served both in financial concessions and compromising
9 constitutional claims. The associations have championed this
10 last sacrifice to protect retirees from more severe financial
11 hardship and to help the city exit from bankruptcy.

12 The associations now hope that this closing
13 statement in support of the plan is the last page in their
14 involvement in the City of Detroit's Chapter 9 case and that
15 the city and its retirees can regain a sense of certainty and
16 begin to heal from this trying process. It is now time for
17 retirees and the city to emerge from bankruptcy to
18 collectively write a new and brighter chapter for the City of
19 Detroit.

20 With that, your Honor, I would like to rely on the
21 statements, arguments, and evidence presented by the city,
22 the Retiree Committee, the Retirement Systems, and all of the
23 plan supporters and respectively join them in requesting that
24 your Honor confirm the city's plan of adjustment. Thank you.

25 THE COURT: Thank you, sir.

CLOSING ARGUMENT

MS. PATEK: Good afternoon, your Honor. Barbara Patek, Erman, Teicher, Zucker & Freedman, on behalf of the Detroit Police Officers Association, and I, too, will be very brief in support of the plan.

And before I get into the main part of my argument, I do want to -- the Court raised the issue of the individual employee indemnification claims, which is an issue that is of great importance to the Detroit Police Officers Association. As the Court is aware, we do support the city's position with regard to discharging those claims to the extent of the city's indemnification obligation. We did file Class 14 claims out of an abundance of caution. We do have a collective bargaining agreement that has now been approved by the state, and I also think there are parts of the city charter that set forth exactly what that obligation is. I do believe it is somewhat broader than in the course of the employment, but if the Court needs or wants something more specific, we can certainly provide it.

Other than that, I want to briefly address two related issues about which the Court has raised questions, one being the city's reasonable business justification for discrimination in this case in favor of the Class 10 pension claims and, second, with regard to feasibility. As the Court will recall, 15 months ago the Detroit Police Officers

1 Association together with the other Detroit public safety
2 unions came into the court taking what some thought was the
3 unusual position of supporting the city's request for an
4 order confirming the automatic stay and the application of
5 the extended stay while at the same time vigorously opposing
6 the city's eligibility for bankruptcy based upon the city's
7 stated intent to impair our constitutionally protected
8 pension benefits. There was a reason we took that position,
9 and we took that position because the Detroit Police Officers
10 Association understood, based upon their daily work
11 experience, what this Court learned and so graphically
12 detailed in its eligibility opinion, the depth of the city's
13 service delivery insolvency. We didn't need a bus tour or a
14 complicated series of spreadsheets to understand the depth of
15 that insolvency. We lived it every day or our members lived
16 it every day in their work. As the Court heard from every
17 witness to address the issue, including Chief of Police Craig
18 and Mayor Duggan, the city's police officers were underpaid,
19 undermanned, and overworked at the time the city came into
20 these proceedings. We stand before the Court today with a
21 state-approved collective bargaining agreement that will set
22 the floor and stop the free fall that had been occurring in
23 terms of wages and benefits and so that the police officers
24 of the City of Detroit can now go to work without looking
25 over their shoulders about when the next shoe is going to

1 drop.

2 And with that regard, I want to address what I think
3 is almost stating the obvious, that -- I don't want to wade
4 into what the discrimination is because we're not equipped to
5 do that, but to the extent that there is discrimination here,
6 I think the evidence before the Court not only shows that
7 that discrimination is supported by reasonable business
8 judgment but that that discrimination was likely essential to
9 the city's ability to put forth a confirmed and feasible
10 plan. Given the city's economic limitations as this Court
11 has heard, given the skinniness of this plan, the city's
12 ability to be able to continue to provide effective public
13 safety, to treat its police officers fairly, and to provide
14 them with the compensation they deserve necessarily required
15 minimal and the more modest impairment than what was
16 originally suggested. And I think in terms of feasibility
17 itself, the difference -- and I think this Court acknowledged
18 it in its eligibility opinion. I want to point to two things
19 the Court said. There is a material difference when we're
20 looking at feasibility between Chapter 11 and Chapter 9, and
21 I think when this Court found the city service delivery
22 insolvent and more specifically found that the city could not
23 reduce employee expenses without further endangering the
24 public health and safety, that finding justified its
25 statement that no one should assume that this Court will

1 confirm a plan that impairs pension benefits. There's no
2 doubt that the state and the city under Sections 904 and 903
3 of the Code and particularly with PA 436, which vests
4 enormous power in a single individual, the emergency manager,
5 have a lot of power and that there are some ways in which
6 this Court's authority over them is limited. Nevertheless,
7 in determining whether or not the plan is fair and equitable,
8 the Court must find, as Ms. Kopacz testified, that the city
9 is able to provide a basic level of essential municipal
10 services, and clearly police protection is one of those
11 services. So based on that, we would ask the Court to
12 confirm the plan.

13 And I would also indicate as one last point Mr.
14 Bennett indicated, I think, when we went back on the record
15 this morning that the city is going to provide the collective
16 bargaining agreements for approval by the Court, and I
17 believe on the first issue of the Section 1983 claims the
18 language the Court is looking for will be in those
19 agreements. Thank you, your Honor.

20 THE COURT: Thank you.

21 CLOSING ARGUMENT

22 MR. QUINN: Good afternoon, your Honor. I'm John
23 Quinn, an objector representing myself. My objections are
24 stated in Docket Number 5723 filed on July 1st, 2014. This
25 afternoon I intend to respond to the city's arguments on

1 issues raised in my objections and attempt to answer any
2 questions the Court may have concerning those objections.
3 Except to the extent necessary to serve those objectives, I
4 do not intend to repeat the arguments I made when I initially
5 filed the objections.

6 I've objected to confirmation of the plan of
7 adjustment as amended on two grounds. First, the plan should
8 not be confirmed unless it is modified to adjust only the
9 city's liability, if any, on the claims included in Class 11,
10 not the General Retirement System's liability on those
11 claims. And, second, by attempting to impose the ASF
12 recoupment on claims whose holders have not individually
13 agreed to its application to their claims, the plan imposes
14 nonconsensual less favorable treatment on those claims than
15 on other claims in Class 11 in violation of 11 U.S.C.,
16 Section 123(a)(4).

17 I maintain that the plan of adjustment as amended is
18 defective as a matter of law. I understand Mr. Karwoski, in
19 addition to discussing his own objections, which overlap
20 mine, will have something to say about how the law I will
21 discuss with regard to ASF recoupment applies to the facts
22 shown in the evidence.

23 I've prepared a list of authorities and documents I
24 may cite during my closing and provided copies to counsel.
25 If the Court wishes, I could also provide -- may I approach?

1 THE COURT: Yes, please.

2 MR. QUINN: I'll discuss my objections in the order
3 in which I've just stated them this afternoon. The city
4 addresses my first objection in its consolidated response,
5 which is Docket Number 7303, filed on September 5th, 2014.
6 The city does not appear to disagree with my reading of 11
7 U.S.C., Section 941, to permit adjustment of the debts only
8 of the city, not of any other party, nor does it challenge my
9 argument that GRS is an entity distinct from the City of
10 Detroit and, therefore, not a debtor in this bankruptcy. The
11 city does argue that pensions are obligations of the city and
12 seems to conclude that they, therefore, are not obligations
13 of GRS ignoring the obvious point that distinct parties can
14 be joint obligors on the same claim. Michigan law is clear
15 that payments to retirees covered by a public pension system
16 are obligations of the trustees who administer the system
17 whether or not they are also obligations of the governmental
18 entity that sponsors the system. I discussed Michigan law on
19 that point in Docket Number 5723 at pages 12 to 14 and will
20 not consume additional time repeating that discussion here.
21 I do not dispute the city's position that it is liable to me
22 for my monthly pension payment. If the Court's reading of
23 the first sentence in Article IX, Section 24, of the Michigan
24 Constitution is correct, then that liability, the city's
25 liability, can be adjusted in this bankruptcy, but the city

1 does not actually make those monthly payments. GRS does. It
2 should be obvious that GRS does not send me money every month
3 out of eleemosynary generosity. I get the money from GRS
4 because the GRS trustees owe me the money. They have a
5 fiduciary duty to pay my pension and --

6 THE COURT: What's the source of that obligation?

7 MR. QUINN: The source of that obligation is
8 primarily the pension -- the Public Employees Retirement
9 System Investment Act, more commonly known as PERSIA.

10 THE COURT: That act says the city owes you a
11 pension?

12 MR. QUINN: No. It says --

13 THE COURT: What's the source of the obligation?

14 MR. QUINN: I'm talking -- the source of the
15 trustee's obligation?

16 THE COURT: To pay you.

17 MR. QUINN: Yes. That's in PERSIA. They hold the
18 funds in trust for the benefit of all the -- of all retirees,
19 and one of their duties as trustees obviously is at the
20 appropriate time -- that is, when we retire -- to disburse
21 the funds. That's what PERSIA says.

22 THE COURT: I'm apparently not making myself clear.

23 MR. QUINN: All right.

24 THE COURT: What is it that identifies you as a
25 beneficiary?

1 MR. QUINN: The fact that I am a member of GRS,
2 having been an employee of the city, obtained a vested
3 pension, and --

4 THE COURT: So it's your relationship with the city
5 that gives rise to your pension rights from GRS? Yes?

6 MR. QUINN: That's correct.

7 THE COURT: Okay. Assume there were no plan for
8 just a second --

9 MR. QUINN: All right.

10 THE COURT: -- and we were not in bankruptcy.

11 MR. QUINN: All right.

12 THE COURT: What would prevent the city and GRS from
13 coming to precisely the same agreement that they have come to
14 here in this bankruptcy?

15 MR. QUINN: Oh, you mean there were no plan of
16 adjustment? You're not talking about there were no pension
17 plan.

18 THE COURT: That's the plan I meant. You're right.

19 MR. QUINN: Okay.

20 THE COURT: Plan of adjustment. There were no plan
21 of adjustment and no bankruptcy.

22 MR. QUINN: Well, because it would be inconsistent
23 with the duty that GRS has to the beneficiaries. It's a
24 trustee for the benefit of the beneficiaries, and --

25 THE COURT: All right. So under what circumstances,

1 if any, outside of bankruptcy --

2 MR. QUINN: Um-hmm.

3 THE COURT: -- can adjustments to pension
4 beneficiaries be made?

5 MR. QUINN: As to beneficiaries who -- as to
6 benefits that are already vested, I believe the answer is
7 there are no such circumstances under Michigan law. Okay.

8 THE COURT: Why is that?

9 MR. QUINN: Because the -- all right. The Michigan
10 Constitution, Article IX, Section 24, has two paragraphs,
11 each one sentence long. The Court in the opinion regarding
12 eligibility construed the first sentence, but the second
13 sentence imposes a duty fully to fund pensions every year.
14 Once that money is there with GRS, GRS has a duty as a
15 trustee to make sure that -- to enforce that duty on the
16 city, and PERSIA tells -- gives GRS the duty to inform the
17 city every year of how much it has to contribute. Once GRS
18 has the contributions, the only -- it can only use it for the
19 benefit of its members and for the administration of the
20 plan, and so GRS has a straightforward duty to pay the
21 pension benefits to the beneficiaries pursuant to the plan
22 documents. It's essentially the ordinances creating the plan
23 and the city charter creating the plan are like a trust
24 instrument, a deed of trust that creates a trust with the
25 city as the settlor and GRS -- the GRS trustees as trustee

1 for the benefit -- for the benefit of the beneficiaries. The
2 trustee has a duty to administer those funds which the
3 settlor has a duty to provide in this case under Michigan law
4 for the benefit of the beneficiaries.

5 THE COURT: You may not want to assume this, but let
6 me ask you to assume it for the moment that the Court was
7 correct in its eligibility opinion that each of these
8 obligations is contractual in nature and, therefore, subject
9 to impairment in bankruptcy. What's the problem with
10 impairing your pension claims?

11 MR. QUINN: Your Honor, I did not read the
12 eligibility opinion -- of course, I'm sure the Court
13 understands what it meant to say better than I do. I did not
14 read the eligibility opinion to construe the second paragraph
15 of Section -- of Article IX, Section 24. That paragraph says
16 nothing about a contractual obligation. It imposes a
17 straightforward constitutional obligation to fund pensions
18 fully every year. That's a duty that the people of the State
19 of Michigan have chosen to impose on their state and all its
20 political subdivisions who have pension plans. Since it's a
21 constitutional duty, it's not something that the city, the
22 governor, the legislature, or any of them in combination have
23 the power to give up to allow it to be adjusted in Chapter 9,
24 and, of course, the Court cannot adjust any obligation in
25 Chapter 9, any obligation of a municipal corporation, without

1 the consent of the state. And since we're talking about a
2 constitutional provision that does not delegate the governor
3 or the legislature or the city the right to waive it or to
4 allow it to be adjusted in Chapter 9, nothing they have done
5 creates that, and so it's not within the jurisdiction of the
6 Court to adjust that duty.

7 THE COURT: Well, okay. So what's the case law that
8 says state consent to adjust a particular debt is necessary
9 in Chapter 9? Isn't that consent inherent in the
10 authorization to file?

11 MR. QUINN: If it's given by someone who has the
12 power to give the consent.

13 THE COURT: Governor Snyder?

14 MR. QUINN: No. Since it is a constitutionally
15 imposed obligation, it's not one that anyone other than those
16 who can amend the Constitution can --

17 THE COURT: Didn't I overrule that argument in the
18 eligibility opinion?

19 MR. QUINN: If you did, your Honor, I didn't see it.
20 As far as I could see in the --

21 THE COURT: Well, the argument was made there that
22 because of the first sentence of Article IX, Section 24, the
23 governor can't consent to a bankruptcy that will impair
24 pensions.

25 MR. QUINN: Right.

1 THE COURT: I got past that.

2 MR. QUINN: Right. Well, but there was no
3 discussion that I saw in the opinion --

4 THE COURT: Right. You're right about that, but my
5 question to you is why wouldn't the same rationale apply to
6 the second sentence?

7 MR. QUINN: Because the first sentence explicitly
8 says that the obligation it creates is a contractual
9 obligation, and the Court reasoned that contracts are exactly
10 what gets adjusted in bankruptcy. And so when the people of
11 the state chose to call it a contractual obligation, that is
12 the obligation to pay pensions as they come due, which is
13 distinct from the obligation to fund pensions. I think the
14 reason I say it's consent, the Court may recall that it
15 quoted at length from -- I think it was Kosa --

16 THE COURT: Um-hmm.

17 MR. QUINN: -- the history at the Constitutional
18 convention, and that history makes it clear that the
19 obligation imposed by the first sentence is distinct from the
20 obligation imposed by the second sentence. And so when
21 you -- when the Court construed the first sentence, I don't
22 think it said anything about the second sentence.

23 THE COURT: Okay.

24 MR. QUINN: So, anyway, just to summarize that part
25 of my argument, despite what the plan of adjustment and the

1 materials accompanying my ballot seemed to indicate, the
2 outcome of this case cannot affect the amount GRS pays me on
3 the first of every month.

4 I'll now move on to the second issue raised in my
5 objections, whether the plan violates 11 U.S.C., Section
6 1123(a)(4), by attempting to impose nonconsensual less
7 favorable treatment on claims or interests affected by the
8 ASF recoupment than on other claims or interests in Class 11.
9 The city argues that the ASF recoupment does not treat claims
10 differently. Rather, it treats creditors differently. But
11 my claim as a member of Class 11 is for a monthly pension
12 payment. Same is true of every other present or future
13 retiree who has a claim in Class 11. Each of our claims is
14 for pension payments, and the plan of adjustment does not
15 provide the same treatment.

16 THE COURT: Well, but hold on there. A moment ago
17 you told me it's not the city that owes you the money.

18 MR. QUINN: I think what I said, your Honor, is I
19 accept the city's position that it is liable for that even
20 though GRS is also liable. The city says it's liable to me
21 for my pension payments.

22 THE COURT: Well --

23 MR. QUINN: Its liability can be adjusted according
24 to the Court's opinion on eligibility.

25 THE COURT: You've lost me there.

1 MR. QUINN: All right.

2 THE COURT: I just don't follow that.

3 MR. QUINN: The city has --

4 THE COURT: Is it your argument that there's a kind
5 of joint and several liability, the city's portion of which
6 can be adjusted but the Retirement Systems' portion of which
7 can't be adjusted?

8 MR. QUINN: As long as the city says it's liable,
9 and it does, yes, that's the case. I really don't take a
10 position on whether the city is liable, but the city says it
11 is. I do say that GRS is liable. If they're both liable,
12 then it is a joint liability, but joint -- when two debtors
13 have a joint liability --

14 THE COURT: Well, hold on. But a moment ago when
15 you started to launch on this classification issue, you're
16 talking about the liability of the city to you --

17 MR. QUINN: Yes.

18 THE COURT: -- unless I missed something.

19 MR. QUINN: Yes, a liability -- the city's
20 liability -- the city has told us in its reply to these
21 arguments that it is liable to me for my pension. I'm not --

22 THE COURT: A question on which you don't take a
23 position.

24 MR. QUINN: I certainly don't dispute it, and if
25 they are liable and the Court is correct in its construction

1 of the first sentence of Article IX, Section 24, then that
2 liability can be adjusted, and the question is can -- then we
3 have to face the question of whether it's being adjusted in a
4 way that treats all claims in Class 11 the same.

5 THE COURT: Okay. Give it your best shot.

6 MR. QUINN: For most claims of retirees in Class 11,
7 the city's liability for monthly pension payments is to be
8 reduced, as the Court knows, by 4.5 percent and the
9 elimination of COLA, but the city's liability on my
10 pension -- on my monthly pension payment is to be reduced by
11 20 percent plus the loss of COLA, so my claim for a monthly
12 pension benefit is receiving substantially less favorable
13 treatment than the claims of other retirees in Class 11, and
14 I have not been asked to agree to this less favorable
15 treatment.

16 I do not take a position on the question whether the
17 city's distinction between -- whoops, I think I skipped a
18 page here. I'm sorry. I don't take a position on the
19 question of whether the city's distinction between treatment
20 of claims and treatment of creditors makes sense when applied
21 to current employees who have pension claims and open ASF
22 accounts. As I understand it, the ASF recoupment does not
23 result in additional reductions in their pensions; that is,
24 their claims as members of Class 11. Rather, it results in
25 the removal of money from their ASF accounts. But we

1 retirees don't have ASF accounts, so no money can be taken
2 from my ASF account. Instead, under the plan, my pension is
3 reduced, and my pension is my claim as a member of Class 11.

4 THE COURT: So how would you have preferred to see
5 classification?

6 MR. QUINN: I have no problem keeping the class as
7 it is, but being what it is all members of the class, all
8 claims in the class have to receive the same treatment.

9 THE COURT: I'll restate the question.

10 MR. QUINN: Okay.

11 THE COURT: If the city proposed to treat your claim
12 the way it did and in a way that you argue is different from
13 the way it is treating other members of the class --

14 MR. QUINN: Um-hmm.

15 THE COURT: -- in violation of Chapter 11, how would
16 you have proposed the city classify your claim?

17 MR. QUINN: It could either be a separate class or a
18 subclass of Class 11 that would vote separately.

19 THE COURT: Um-hmm. Would you propose that all
20 creditors whose monthly payment amounts are reduced because
21 of this ASF issue be in a separate class from all pension
22 creditors who are not affected by this issue?

23 MR. QUINN: Your Honor, to be perfectly honest,
24 since I'm a novice at bankruptcy, I'm probably not the best
25 person to ask, but what would make sense to me is that they

1 should be in a subclass. The Class 11 --

2 THE COURT: Well, I don't want to argue class or
3 subclass because --

4 MR. QUINN: Okay.

5 THE COURT: -- I've actually never really understood
6 what that distinction is, but --

7 MR. QUINN: All right. Well, I'm glad to hear that,
8 your Honor, because I don't understand --

9 THE COURT: Yeah. Okay. Fair enough. But the
10 point is they should be separately classified whether it's --

11 MR. QUINN: Well, if you --

12 THE COURT: -- Class 1 and 2 or Class 1-A and 1-B.

13 MR. QUINN: If we were going to go back and revote,
14 that would make sense, but I don't think --

15 THE COURT: All right.

16 MR. QUINN: -- we're about to do that. I hope not.

17 THE COURT: Okay. But here's where I stumble with
18 your argument. Some people's reduction is less than yours;
19 right?

20 MR. QUINN: Most are, yes.

21 THE COURT: So their pension payment is more than
22 yours; right?

23 MR. QUINN: You mean their pension payment? Oh, the
24 amount they receive?

25 THE COURT: Yeah.

1 MR. QUINN: Well, that depends on how much they put
2 in and their years of service and so on, but --

3 THE COURT: Right, but the reduction that they
4 suffer because of ASF is less.

5 MR. QUINN: Is less. Is less, yes.

6 THE COURT: Okay. Should they be in a different
7 class, too?

8 MR. QUINN: That's a good question, your Honor. If
9 we were at the point where we had to design classes, I think
10 that's an important question. We're well beyond that. We
11 did vote as a single class. The city chose to put us all in
12 one class, and it, therefore, has to --

13 THE COURT: Well, I want to understand what the
14 practical ramification of your argument might be in this case
15 to judge its merit.

16 MR. QUINN: All right.

17 THE COURT: Does it mean that a separate class has
18 to be created for every percentage point of reduction?

19 MR. QUINN: I wouldn't think so, your Honor.

20 THE COURT: Where is the line drawn then?

21 MR. QUINN: Well, I point out that I'm not
22 suggesting that ASF recoupment should not be part of the plan
23 even with the class as it is. I'm simply saying that since
24 it does provide --

25 THE COURT: And I'm not suggesting that you are

1 suggesting that. This is a classification question.

2 MR. QUINN: All right.

3 THE COURT: Where's the line?

4 MR. QUINN: Well, perhaps there is no line, and
5 perhaps for that reason they need to be in the same class,
6 but if they do need to be in the same class, then that simply
7 means that every class member who's receiving less favorable
8 treatment has to agree to the less favorable treatment. It's
9 not -- I'm not suggesting that ASF recoupment shouldn't be in
10 the plan or even with Class 11 as it is. I'm simply --

11 THE COURT: So am I right then that your argument is
12 not a classification issue, it's --

13 MR. QUINN: No.

14 THE COURT: -- the argument that everyone whose
15 pension is reduced because of ASF must consent to it?

16 MR. QUINN: That's correct. That's what 11 --

17 THE COURT: Ah, that's a different question.

18 MR. QUINN: That's what 1124 -- or 1123(a)(4) says.

19 THE COURT: Okay.

20 MR. QUINN: And that's what I'm relying on.

21 THE COURT: Okay. So -- okay. So the argument is
22 because they are receiving a less favorable treatment, they
23 are -- this Code section requires their specific consent.

24 MR. QUINN: That's correct, your Honor.

25 THE COURT: Okay.

1 MR. QUINN: And I should point out that the limited
2 option to pay off part of the ASF recoupment in advance
3 doesn't really change this analysis as --

4 THE COURT: No, it wouldn't. I agree with you on
5 that.

6 MR. QUINN: Okay. The city goes on to argue that
7 the ASF recoupment without individual agreement is justified
8 because the GRS trustees violated fiduciary duties by making
9 excessive credits to ASF accounts during certain fiscal
10 years. For the moment I'll assume this is true that the
11 trustees did make excessive allocations to ASF accounts. I
12 understand Mr. Karwoski will argue that the evidence fails to
13 support this contention and, in fact, shows it to be false,
14 and I agree with him, but right now I want to explain why the
15 city's position would fail as a matter of law even if it did
16 have evidentiary support. First, under Section 1123(a)(4),
17 the only justification for disparate treatment within a class
18 is agreement to the disparate treatment by each class member
19 whose claim is subjected to less favorable treatment.
20 There's no set of facts and no legal or equitable theory that
21 defeats the requirement of individual agreement to less
22 favorable treatment. It has to be that way to protect the
23 integrity of the voting process within each class to prevent
24 a situation in which a majority of class members can impose a
25 result inimicable to the interests of a minority whose

1 interests differ from those of the majority.

2 Second, the city's rationale for the ASF recoupment
3 is fundamentally unsound as a matter of law. The city argues
4 that those GRS members whose accounts received excess credits
5 have become trustees of the funds so credited. The city
6 doesn't cite any Michigan law in support of this position but
7 relies on Harris Trust for the proposition that with certain
8 exceptions, quote, "when a trustee in breach of his fiduciary
9 duty to the beneficiaries transfers trust property to a third
10 person, the third person takes the property subject to the
11 trust," but by its own terms the proposition upon which the
12 city relies does not apply to the facts it alleges. This is
13 so for two reasons. First, the creditors affected by the ASF
14 recoupment are not third parties to the trust. We are all
15 GRS members whether current employees, retirees, or
16 beneficiaries designated by deceased retirees and, therefore,
17 trust beneficiaries. And, second, the allegedly improper
18 credits to ASF accounts were not transfers of trust property.
19 The funds so credited remained in the trust corpus. GRS, as
20 trustee, retained title to those funds, and the beneficiaries
21 whose accounts were credited acquired no title continuing to
22 hold only beneficial interests in the funds. Indeed, this
23 case provides an example of the necessity for the limitations
24 included in the principle enunciated in Harris Trust. Those
25 limitations prevent the oxymoronic result in which certain

1 ASF account holders become trustees of parts of the corpus of
2 the GRS trust to which they are beneficiaries while acquiring
3 no title to any part of the corpus. So Harris Trust doesn't
4 work for the city and wouldn't work even if it were a
5 Michigan law, but that's not the only authority the city
6 relies on in its attempt to justify the ASF recoupment. It
7 also relies on comment G-3 to the Restatement 3d of Trusts,
8 Section 104, but that comment has nothing to do with trust
9 beneficiaries becoming unwitting trustees. It's entitled
10 "Unjust Enrichment." It notes that a beneficiary may incur
11 liability to the trust under the law of unjust enrichment
12 except to the extent that a defense to restitution applies
13 and gives the example quoted by the city of a beneficiary who
14 because of a breach of the trust receives trust property to
15 which the beneficiary is not entitled. Of course, a comment
16 in the Restatement of Trusts is even less helpful than Harper
17 Harris Trust in discerning Michigan law, but I won't quibble
18 about that because there are plenty of Michigan cases that
19 provide a remedy for unjust enrichment defined as, quote,
20 "The unjust retention of money or benefits which in justice
21 and equity belong to another." Among the cases are Tkachik
22 versus Mandeville and Dumas versus Auto Club. If the
23 plaintiff were GRS, the defendants were creditors who
24 received excess ASF interest, and the excess credits had
25 occurred as claimed by the city, then the ASF recoupment just

1 might jibe with those elements, but even if the elements were
2 made out, there are defenses to an unjust enrichment claim.
3 One is the statute of limitations. To evaluate that defense,
4 it's necessary to identify the appropriate limitations period
5 and determine when the claim accrued. The limitations period
6 is not in dispute. The city, Mr. Karwoski, and I agree that
7 any claim for unjust enrichment would be subject to the six-
8 year limitations period established by Michigan Compiled
9 Laws, Section 600.5813.

10 THE COURT: Are you sure the city agrees with that?

11 MR. QUINN: They said so in their consolidated
12 reply. Actually, I should amend that. The city relies on
13 Michigan Compiled Laws, Section 600.5807(8), paren 8, for the
14 six-year limitations period, but it's actually Section 5813
15 that applies here, so I mean we reach the same result using
16 different statutory sections.

17 So the next question is when do the claims accrue?
18 In Michigan a claim accrues, with exceptions not applicable
19 here, when the wrong upon which the claim is done. It's when
20 we seek to identify the wrong that was done that it becomes
21 clear why the city has so strenuously struggled against logic
22 to make it appear that the principle that derives from Harris
23 Trust applies to the ASF recoupment. City needs the fiction
24 that GRS members became trustees without knowing it of
25 allegedly excessive funds allocated to their ASF accounts on

1 the date of each allocation. It uses that fiction to argue
2 that the claim against each such trustee accrues only when
3 she repudiates her fiduciary duty with reference to those
4 claims. Of course, that can't happen until the unwitting
5 trustee is informed that she has a fiduciary duty to
6 repudiate, and none of us were so informed until we read the
7 original plan of adjustment on or after February 21st, 2014.
8 So, according to the city, none of the claims based on the
9 recoupment accrued before February 21st, 2014.

10 I have to say that's an admirably clever argument,
11 but it doesn't work because we're talking about unjust
12 enrichment claims, not claims against make believe
13 fiduciaries. Under Michigan law that's what we're talking
14 about. The wrong upon which each such claim is based is the
15 alleged unjust enrichment, and that occurred each time a GRS
16 member received an improper increase in their beneficial
17 interest in the corpus of the GRS trust; that is, on the date
18 of each allocation of allegedly excessive interest.

19 It follows that each claim upon which the ASF
20 recoupment is based is time-barred unless it's based on an
21 allocation of interest that happened less than six years
22 before the date upon which GRS, the only plaintiff with
23 standing, commences an action based on the claim. GRS has
24 not commenced such an action, so we can say, at a minimum,
25 that all ASF recoupment claims based on allocations of

1 interest earlier than October 2008 are time-barred.

2 Moreover, under Michigan law as explained in
3 Michigan Educational Employees Mutual Insurance Company
4 versus Morris, GRS is estopped from prosecuting an unjust
5 enrichment claim if the recipient of the unjust benefit
6 relied upon it to her detriment. The form of such reliance
7 might vary among GRS members affected by the ASF recoupment.
8 No doubt many of us relied on the full reported balances in
9 our ASF accounts in making and beginning execution of
10 retirement plans that would become infeasible if the benefits
11 were partially taken away. Others may have made decisions
12 regarding the need for and the expected -- the acceptable
13 level of risk in other investments in reliance on our
14 expected pensions and reported ASF balances.

15 The city attempts to gloss over all these issues by
16 acting as judge and jury and including its final judgment,
17 the ASF recoupment, in the plan of adjustment thus overruling
18 all defenses of persons affected by the recoupment without
19 even providing them with --

20 THE COURT: Well, isn't a fair way to state it that
21 instead of the city acting as judge and jury, it has come to
22 a settlement of the issue in light of the complexity of the
23 issues you raise, in light of the complexity of the
24 litigation that would have to result if there were no
25 settlement, and it has asked this Court to act as judge in

1 approving the reasonableness of the settlement? Isn't that a
2 fair way to look at this?

3 MR. QUINN: I don't think so, your Honor, because
4 the settlement -- I assume the Court is talking about the
5 settlement with the Retiree Committee, and to be perfectly
6 honest, it seems to me as to ASF recoupment the retiree was
7 in a serious conflict situation because most of the retirees
8 it was supposed to represent are unaffected by ASF
9 recoupment. It's been said that without ASF recoupment,
10 those individuals would be getting much larger cuts in their
11 pensions, and so essentially what the Retiree Committee
12 agreed to was to take money from some of the people it was
13 supposed to be representing and transferring it to other
14 people.

15 THE COURT: Okay. That may be an argument to make
16 as to why the settlement is not reasonable, but that wasn't
17 my question.

18 MR. QUINN: All right. I'm sorry, your Honor.

19 THE COURT: Yeah. My question was how do we look at
20 this? Do we look at this as the city acting as judge and
21 jury and imposing its judgment on this issue on all of you
22 and unfairly so when I suggested that the alternative way to
23 look at this was it was a settlement subject to this Court's
24 approval on whether the settlement is reasonable? Isn't that
25 a better way to look at it? Wouldn't you do better to argue

1 that the settlement is unreasonable than to say this is the
2 city imposing its judgment on everyone?

3 MR. QUINN: Well, your Honor, except that the -- and
4 I think Mr. Karwoski is going to address this in more detail.

5 THE COURT: Oh, okay.

6 MR. QUINN: Okay. And, of course, the bottom line
7 is the proper way to accomplish this under Section
8 1123(a)(4), you don't settle with some committee appointed by
9 the U.S. Trustee to represent all retirees. You have to
10 settle with each individual to whom you want to give less
11 favorable treatment. And I should mention that raises a
12 question that I would like to briefly discuss if I could take
13 a few more minutes.

14 THE COURT: Go ahead.

15 MR. QUINN: And that is what could possibly motivate
16 us who are affected by the AS recoupment to agree to it? Why
17 would we agree to it?

18 THE COURT: Why is that an important question?

19 MR. QUINN: Well, I suppose -- I shouldn't have said
20 "important," your Honor. I guess it's not important. If
21 it's required to do that, it makes no difference what the
22 result would be, but I don't want --

23 THE COURT: I'm willing to assume none of you would
24 have agreed to this.

25 MR. QUINN: Well, I'd like to suggest that that

1 assumption is not necessarily correct, your Honor.

2 THE COURT: But what difference does it make? It is
3 what it is.

4 MR. QUINN: In the legal analysis, it makes no
5 difference.

6 THE COURT: All right.

7 MR. QUINN: Okay. Now, I need to call the Court's
8 attention to one other issue concerning the ASF recoupment,
9 but, unfortunately, I lack the expertise to be of much help
10 in resolving the issue. It's important because it appears to
11 me, relatively completely untrained in bankruptcy, that it
12 goes to subject matter jurisdiction.

13 THE COURT: Let me pause to suggest to you that as
14 untrained as you claim to be, you're doing really well.

15 MR. QUINN: Well, thank you, your Honor. I
16 appreciate it.

17 THE COURT: I'm sure any of my colleagues would
18 welcome you into their court anytime --

19 MR. QUINN: Frankly, your Honor, after this --

20 THE COURT: -- as a representative, of course.

21 MR. QUINN: Right, yeah. After this baptism of fire
22 into bankruptcy practice, I would decline the invitation.

23 THE COURT: All right. What's your last point here?

24 MR. QUINN: Okay. The question I wanted to raise --
25 and I think it's important because it does go to subject

1 matter jurisdiction -- is whether a claim that one
2 creditor -- in this case, GRS -- might assert but has not
3 asserted against other creditors is the sort of related
4 matter to which federal jurisdiction attaches in the absence
5 of any possibility that the creditors against whom the claim
6 might be asserted could pass on all or part of their
7 potential liability to the debtor.

8 If the Court has any questions, I'll be happy to
9 answer them. If not, I thank the Court for its attention,
10 and perhaps more than others I should thank the Court for its
11 patience with -- I appreciate your kind words, but I do feel
12 very much like an amateur here, and so I appreciate the
13 Court's patience with me and with the other individual
14 objectors.

15 THE COURT: Well, you're welcome, sir. Thank you.

16 CLOSING ARGUMENTS

17 MR. KARWOSKI: Good afternoon, your Honor. Mike
18 Karwoski, an individual objector. Like the other counsel and
19 Mr. Quinn before me, I want to thank the Court for allowing
20 Mr. Quinn and me to participate in this confirmation hearing.

21 THE COURT: Sure.

22 MR. KARWOSKI: And I want to thank your staff for
23 all the help that they've provided, and they've been very
24 pleasant to deal with and have gone above and beyond the call
25 of duty. I also appreciate the opportunity to have

1 participated in this Chapter 9 as a member of the Retirees'
2 Committee. I have the highest regard -- and I realize it's
3 getting late.

4 THE COURT: That's okay. Take your time.

5 MR. KARWOSKI: I have the highest regard for my --
6 and affection for my fellow committee members and for the
7 professionals that we hired. I think one of the best things
8 we did was the first things, the first step, which was to
9 hire professionals, Dentons, Matt Wilkins' law firm, Segal,
10 and Lazard, and they've served the committee very well. I
11 appreciate the work that the committee did. I think the
12 committee has -- I hope has been a help to the Court in
13 resolving the issues related to retirees' pensions and
14 healthcare benefits in particular. I appreciate having been
15 a part of it. I hope I've contributed a little bit to the
16 work of the committee.

17 I change hats again and part with the committee only
18 as to ASF recoupment. I otherwise would support the plan of
19 adjustment and encourage your Honor to confirm it but without
20 ASF recoupment being a part of it.

21 THE COURT: Do I have the authority to do that?

22 MR. KARWOSKI: I hope you have the obligation to do
23 it, your Honor. I believe that ASF recoupment is --

24 THE COURT: Here's my problem with that. The
25 Bankruptcy Code -- I forgot the specific section, but it does

1 say that only the city can file a plan, and so if I confirm
2 the plan that you are asking me to confirm, it's not the
3 city's plan. It's my plan.

4 MR. KARWOSKI: The way I would look at that would be
5 to indicate that you would not confirm this plan including
6 ASF recoupment but that you would confirm an otherwise
7 identical plan that does not include ASF recoupment.

8 THE COURT: Well, but the city would have to propose
9 that; right?

10 MR. KARWOSKI: Yes, they would, and if you refuse to
11 confirm this plan, the ball is in their court, so they would
12 likely propose a plan. Whether it would be identical except
13 for ASF or different in other respects, I don't know, but
14 that, of course --

15 THE COURT: Well, it would create --

16 MR. KARWOSKI: -- is the city's prerogative.

17 THE COURT: It would create a hole in their budget
18 of over \$200 million; right?

19 MR. KARWOSKI: No, your Honor. It doesn't create a
20 hole in the city's budget because the ASF recoupment does not
21 go to the city. It goes to GRS.

22 THE COURT: But the city is responsible to plug any
23 hole in the payments to GRS.

24 MR. KARWOSKI: Only ten years from now in 2023
25 depending --

1 THE COURT: Whenever it is, it's still the city's
2 obligation.

3 MR. KARWOSKI: Yes. And that's part of the
4 settlement. As Mr. Montgomery indicated, the city has
5 accepted the obligation to fully fund pensions beginning in
6 2023 and going forward. However, I guess this goes to
7 feasibility, too, which I was going to -- whoops -- address
8 at the end just briefly, but removing ASF recoupment, which
9 is said to be worth about \$190 million, does not create an
10 immediate hole in the plan of that amount because, as Mr.
11 Quinn indicated and Ms. Thomas testified, most of the ASF
12 money is already with the GRS. It's invested together. The
13 ASF money, the traditional pension plan money, the money
14 that's set aside to fund annuities is all there within the
15 GRS, so there would be -- the only new money that would come
16 into the GRS through the plan --

17 THE COURT: Well, what would happen is that the --
18 is that the monthly checks would go back up, right, would
19 return to a normal level, and, therefore, the plans would be
20 paying out that much more? That's the 190 or -- I thought it
21 was 220, but whatever the number is, that's what would create
22 the hole; right?

23 MR. KARWOSKI: Well, taking ASF out would create an
24 actuarial hole of 190 million or 200 million up front but not
25 a real dollar hole. The big blue pot that we had up on the

1 screen a couple of times, which your Honor correctly pointed
2 out, is not an exact representation of what's going on with
3 pensions because it may not be full. There's unfunded
4 accrued actuarial liability, so the pot may be --

5 THE COURT: That UAAL goes up by a dollar for every
6 dollar that a pension claimant gets if ASF is eliminated;
7 right?

8 MR. KARWOSKI: Over the course of time.

9 THE COURT: Of course.

10 MR. KARWOSKI: And the removal --

11 THE COURT: This whole plan is about the course of
12 time.

13 MR. KARWOSKI: Most of the money is in the GRS now.
14 The only new money that would come in potentially shortly
15 after the confirmation of the plan would be the up to \$30
16 million for those ASF participants who --

17 THE COURT: Yeah. I get that, but the money would
18 be going out faster if ASF is eliminated than it otherwise
19 would; right? That's where the new UAAL or the incremental
20 increase in the UAAL would come from.

21 MR. KARWOSKI: Well, no. The pension payments would
22 stay the same on each check. There would be a subtraction
23 for the ASF recoupment, and that would be transferred to
24 another fund within the GRS, so the fund wouldn't go down
25 because of that transaction. The fund would go down over

1 time as payments are made that do not --

2 THE COURT: Let's just be real clear about this, and
3 we'll use simple numbers that are obviously not reality, but
4 suppose a pension check is a hundred dollars without a
5 reduction for ASF and it's \$90 for a check that includes an
6 ASF reduction, okay, just hypothetically.

7 MR. KARWOSKI: Okay.

8 THE COURT: Okay. So without ASF, the plan has to
9 pay ten dollars more than it does with the ASF reduction, so
10 money is going out of the pot quicker without the ASF
11 reduction; right? Assets are being depleted quicker, and,
12 therefore, the city is exposed to the risk -- the likelihood
13 of a higher UAAL down the line, yes, but a higher UAAL. Does
14 that make sense to you?

15 MR. KARWOSKI: Well, in your example, the ten
16 dollars -- I mean the payment on the retiree's check would
17 still be a hundred dollars. It would be reduced by ten on
18 the check as a withholding.

19 THE COURT: Right, but the "pay to the order of"
20 amount --

21 MR. KARWOSKI: Would be ten dollars less, yes, but
22 the ten dollars that's withheld is not going to Blue Cross or
23 HAP. It's going back into the plan. It's just going into a
24 different fund in the plan, so in terms of the funding level,
25 the funding level is the same. What's happening is funds are

1 shifting from one subfund to another within the GRS.

2 THE COURT: Okay. So what happens to that other
3 fund?

4 MR. KARWOSKI: Well, the -- the first fund?

5 THE COURT: The fund that the ASF amount goes into.

6 MR. KARWOSKI: That fund gets larger.

7 THE COURT: What happens to it?

8 MR. KARWOSKI: It is invested along with all the GRS
9 assets, as Ms. Thomas testified.

10 THE COURT: What's it used -- I guess a better
11 question is what's it used for?

12 MR. KARWOSKI: It's used to reduce the unfunded
13 liability over time, but as it does that, it earns interest.
14 It earns the same rate of return as the GRS fund overall, so
15 the fact of having ASF exist at all adds to the -- is to the
16 good of everyone. It's to the good of the GRS. It's to the
17 good of the city. It's to the good of retirees. ASF
18 recoupment, if it is approved as part of this plan, will --
19 over time will diminish the money going into the GRS fund by
20 way of voluntary ASF contributions. There was testimony
21 highlighting some of the numbers from the annual reports that
22 showed over the last few years in the recoupment period for
23 which the reports and the audited financial statements are in
24 evidence, that the voluntary contributions of ASF
25 participants went from about -- in relation to what the city

1 was contributing -- and, of course, the city was getting into
2 financial trouble, which is why it was contributing less, but
3 in spite of that, in dollar amounts ASF contributions went
4 from one-fourth to one-third to one-half of the amount that
5 the city contributed. If I remember the numbers, in 2013,
6 the 2013 report, ASF contributions were 13 million, and the
7 city's contributions were 26 million, so the ASF voluntary
8 contributions were 50 percent of what the city was putting
9 into the pot. For the one year, an earlier year that we had
10 testimony, the ASF -- the two ASF funds, the annuity savings
11 fund and the reserve fund, together their total was \$671
12 million out of a \$2.5 billion total invested in the GRS. It
13 was two-thirds of a billion dollars that was there because of
14 ASF, and I'm not -- I mentioned to Mr. Bennett that --

15 THE COURT: How much would that have been if the
16 plans had not paid out so-called excess interest?

17 MR. KARWOSKI: Well, I'm going to -- I hope I'm
18 going to address whether there actually was such a thing as
19 excess interest, and I hope to show that in the long-term
20 view there's no such thing as excess interest because the way
21 the funds are -- the ASF funds are invested together with the
22 GRS funds, they rise and fall together. So if you take a
23 long enough time horizon, the payouts to ASF roughly track
24 the earnings -- the earnings on ASF, rather, roughly track
25 the earnings on GRS, so there's no net loss to the fund

1 because of ASF, but there's an actual gain because more money
2 is coming in as a result of the voluntary contributions,
3 significantly more money, which would not be there without
4 ASF. ASF recoupment will kill the ASF plan.

5 THE COURT: Well, but every dollar of contribution
6 is a dollar of liability; right?

7 MR. KARWOSKI: It's a dollar of liability, but,
8 again, it's somewhere down the road, and within the -- the
9 methodology -- I have one chart that I want to point to.
10 Within the methodology that the city used to calculate the
11 so-called excess interest, there were three years within the
12 ten-year period in which bonus interest was paid. There were
13 also -- which is part of the so-called excess. There were
14 also three years in which the earnings, the market rate of
15 return on the GRS funds was more than the earnings attributed
16 to ASF, so those -- where did those money -- where did that
17 money go? According to Ms. Thomas' testimony and what we
18 understand to be the way the funds are invested, that
19 additional earnings -- those additional earnings stayed in
20 the overall GRS funds, so they added value over time. Yes,
21 there's an accounting for every dollar that comes in, a
22 dollar goes out, but there's interest that that dollar that
23 came in earned while it was in the GRS funds, and ASF money
24 that comes in stays in for a long time. We heard testimony
25 that the only way a person can withdraw money -- the only

1 time they can withdraw money is when they retire. After 25
2 years, they can -- they can retire only at a minimum after 8
3 or 10 years to vest. They can borrow after 25 years or when
4 they retire, and we heard Mr. Moore testify. He gave the
5 example of the one person who worked for 35 or 37 years and
6 invested voluntary -- voluntarily contributed something
7 like -- I think it was a hundred and some thousand dollars to
8 ASF and when he or she retired walked away with \$1.4 million,
9 and that was given as an example of what's wrong with ASF. I
10 suggest that that's an example of what's right with ASF if it
11 works correctly in the way that it's intended to. That
12 person, if you -- and I did the math, but I'm not going to --
13 not introducing evidence here, but if you do the math and
14 divide out that hundred thousand plus dollars that that
15 person put in over 35 to 37 years, that person contributed
16 something like a couple hundred dollars a month. It's just
17 that she had the savings discipline to do it continuously for
18 37 years, and as that money -- as the earnings on that money
19 was -- those were all voluntary dollars that your Honor
20 suggested went into the fund.

21 THE COURT: Did you calculate the effective rate of
22 return?

23 MR. KARWOSKI: I didn't calculate it, but if it's
24 over 37 years, it would probably be pretty close to 7.9
25 percent because the evidence shows that earnings on the GRS

1 funds over the long period were very close to the target rate
2 of return. There's a comment in the 2004 fiscal year report
3 that says for the 16 years before the beginning of the
4 recoupment period, the average rate of return on GRS funds
5 was 8.6 percent, so that covers 20 years of the 30-some years
6 of that one example. I would say that the rate of return --
7 if the rate of return was 7.9 percent, that person did very
8 well, but it was because of their persistence, their
9 commitment to the city to stay on the job for 35 or 37 years
10 and during that time to contribute an admittedly small amount
11 but to do it for so long and through what -- Mr. Quinn asked
12 Mr. Moore if he knew what the miracle of compound interest
13 was, and Mr. Moore said he didn't, but I think we do. It's
14 the compounding of that interest over time that led to the
15 large total that that person walked away with, and I don't
16 think there's anything wrong with that. I think that's what
17 ASF is supposed to do. It's designed to supplement the
18 relatively meager pensions which for GRS members average
19 about \$19,000 a year. Rather than putting the onus on the
20 city to improve the DB pension plan, which would cost the
21 city more, this is a way that the city has -- it's the city's
22 plan. Annuity savings fund is the defined contribution plan
23 of whatever year, not 1998 but the -- 1973. It's the city's
24 plan. It's administered by the city, and it's designed to
25 allow employees to build for their retirement to have larger

1 pensions but to do it with their own money rather than the
2 city being expected to contribute more, which it clearly has
3 not been able to do in recent years, but through voluntary
4 contributions employees can get a significant boost in their
5 pension through their own voluntary contributions. It's
6 because their funds are invested in the large investment
7 portfolio that GRS has, and that portfolio has done pretty
8 well over most of the years. Within the recoupment period,
9 the recoupment period was a very volatile period. It was
10 perhaps the most volatile ten years in financial markets
11 since the great depression, and there were high years and
12 there were low years. And the city has -- the way it's
13 calculated, the alleged excess interest focuses on the
14 years -- on the high earning years and the years in which the
15 funds -- the market rate of return on the funds was higher
16 than what was -- the city focuses on years in which more was
17 paid to -- credited to ASF accounts than was earned, but
18 there were other years within the recoupment period where the
19 funds -- the overall market rate of return on the funds in
20 general was higher than what was credited to ASF, so those
21 additional earnings on the ASF funds stayed in the General
22 Retirement System traditional plan funds and accrued to the
23 benefit of the plan and to retirees and to the city. That's
24 why I have -- if I can approach, your Honor.

25 THE COURT: Sure.

1 MR. KARWOSKI: Your Honor, what I just handed out
2 and handed your Honor is one page of Exhibit PS14020, which
3 was admitted by the city during its cross-examination of one
4 of the pro se witnesses, and I only copied the cover page,
5 which shows the exhibit that the chart is from. It's at the
6 21st page of the presentation. The pages are not numbered,
7 so I just wanted to make it easier to refer to it, and I'm
8 going to -- I'm way out of order here, but I think this is
9 the better point.

10 THE COURT: Sure.

11 MR. KARWOSKI: This is my -- the point I want to
12 address here is did the city show that excess interest was
13 awarded. Several times the Court asked witnesses to explain
14 why pension funds not only in Detroit but across the country
15 are more underfunded now than they were a decade or so ago.
16 The main reasons given in evidence were, one, plans not
17 living up to investment expectations; two, the collapse of
18 the financial markets in 2008 which affected all plans -- Mr.
19 Montgomery referred to that from Ms. Thomas' testimony --
20 and, three, Ms. Thomas' answer as to Detroit that it's a
21 mature plan having significantly more retirees than actives.
22 Although it's the heart of the city's claim for ASF
23 recoupment, there is no evidence from any of the actuaries
24 that GRS trustees' awards of so-called excess interest
25 contributed to the current UAAL.

1 One area of agreement among the actuaries was that a
2 longer term is better in making financial projections.
3 Discussing the public pension fund survey, Mr. Forna said
4 that using even a ten-year period is way too volatile. The
5 city uses ten-year and forty-year cash flow projections in
6 the plan of adjustment. The city's theory of ASF recoupment
7 is flawed because it ignores the relationship that the
8 annuity savings fund has had with the GRS traditional pension
9 plan funds over a time period measured in decades. Ms.
10 Thomas testified that ASF funds are commingled with
11 traditional pension funds and invested together. The
12 portions of annual reports which were highlighted during her
13 testimony state that GRS trustees invest for the long term.
14 With that perspective, their investment allocation has
15 averaged more than the 7.9-percent targeted rate of return.
16 I quoted the language from the 2004 report.

17 The average interest earned on ASF accounts should
18 perform as well over a long time frame because they're
19 invested together. The way the city calculated excess
20 interest on a year-by-year basis within the recoupment
21 period, which is shown in the chart, and adding up the total
22 exaggerates the rise and fall of financial markets which were
23 especially volatile during this ten-year period. The
24 methodology is unfair as applied. It ignores years in which
25 there were higher gains on ASF accounts -- account funds and

1 were credited to them. Those gains remained with the overall
2 GRS pension accounts to the benefit of all GRS members. Some
3 of the money went the other way. It wasn't just taking money
4 from the GRS members to fund ASF. Some of the ASF earnings
5 when they were higher than what was awarded to them went to
6 the benefit of everybody, including the ASF members, who are
7 part of that overall group, too.

8 The city's theory of recoupment exploits the short-
9 term view and does it in a way so as to exaggerate the
10 appearance of excess interest. How recoupment was calculated
11 is demonstrated in this chart. The fact that the chart uses
12 market -- the fourth column shows fiscal year market rate of
13 return, and that's the number that's played against the
14 amount awarded to ASF accounts. The amount awarded to ASF
15 accounts is the total of the two numbers in the second and
16 the third column. In the second column it's the -- let's
17 call it the base rate interest on ASF, which for all these
18 years was 7.9. The ASF interest bonus was the three years,
19 '05, '06, and '07. So if you add those three -- those two
20 together for the three years, you get the total returns
21 credited to ASF accounts versus the market rate of return.
22 The fact that the chart uses the market rates of return
23 rather than the smooth rates as were used by GRS in the
24 annual reports further exaggerates the volatility of this
25 approach. No credit is given to ASF participants for years

1 in which the market rate was greater than the interest
2 credited to their accounts. The differential between market
3 returns and amounts credited for those years were six -- I
4 just subtracted. The differential is 7.6 percent in 2004,
5 12.3 percent in 2011, and 4.3 percent in 2013. For instance,
6 looking at 2004, the market rate of return that's reported is
7 15.6 percent, but no bonus was paid on ASF, only the base 7.9
8 percent, so the difference between those two is 7.6 percent,
9 which was not credited to ASF accounts within the recoupment
10 period. The city's methodology doesn't take that into
11 account. It doesn't credit the ASF participants for the
12 years in which that happened. It only takes the years in
13 which more interest was awarded, like '07 for instance is
14 the -- is an example of that -- no -- '09, the big loss year,
15 is one of the years that the city puts a lot of weight on
16 when the funds lost almost -- the market funds -- rate of
17 return was almost a minus 20 percent, and the AS interest
18 awarded was 7.9, so that's one of the big years that adds to
19 the so-called excess interest, but it doesn't -- the city
20 does this year by year, which exploits the volatility of the
21 market, particularly during this period, and it's more
22 exaggerated because of using the market rate of return in
23 this calculation. For instance, in the -- well, I'll leave
24 it at that.

25 There was no evidence during the -- the method -- if

1 you're going to use that method and, in effect, charge ASF
2 participants for the years in which they got too much
3 interest, you should also credit them for years in which they
4 got too little if you're going to be philosophically
5 consistent and procedurally consistent, and also just in
6 light of what the actuaries talked about about the long time
7 frames and the fact that ASF has this long historical
8 relationship with GRS and the funds are invested together and
9 they average about the same over time, if you look at the
10 long time horizon, you're not going to get excess interest.
11 You're going to get ASF awards that average about what GRS
12 earnings average, but you can exploit these -- the volatility
13 and the fluctuations, which the city did in calculating the
14 alleged excess, but there was no evidence during the trial of
15 any breach of fiduciary duty or wrongdoing by GRS trustees
16 with respect to the awarding of interest. That's the
17 allegation that the city makes in its --

18 THE COURT: What was the authority to do that?

19 MR. KARWOSKI: The authority to do what? The
20 trustees? I'm sorry. I didn't understand your question.

21 THE COURT: What's the authority to do what you say
22 the trustees did that was not a breach of fiduciary duty?

23 MR. KARWOSKI: The trustees had discretion to award
24 interest on the accounts.

25 THE COURT: Where did that --

1 MR. KARWOSKI: Their discretion --

2 THE COURT: Where did that come from?

3 MR. KARWOSKI: I believe it comes from the city
4 code, from the section of the city code which was amended in
5 2011 to put restraints on the discretion, and --

6 THE COURT: What was that language?

7 MR. KARWOSKI: Pardon?

8 THE COURT: What was that -- I'm sorry, sir. What
9 was that language?

10 MR. KARWOSKI: The language of the ordinance?

11 THE COURT: Yeah, the preamendment language that you
12 say gave the authority to the trustees to do this.

13 MR. KARWOSKI: The language is -- I don't have the
14 exact -- I believe the language is in the ordinance, but it's
15 referenced in the same exhibit. Just give me a second. I
16 believe it's in the same exhibit.

17 THE COURT: Okay. I'll look for it in the exhibit
18 then.

19 MR. KARWOSKI: But it's been -- Ms. Thomas also
20 testified the trustees had discretion. I believe the
21 language is the section of the city code.

22 THE COURT: Well, she could hardly be expected to
23 testify otherwise.

24 MR. KARWOSKI: No, but the -- I mean the fact that
25 the city decided to amend the code to limit the discretion

1 indicates that there was discretion, that it wasn't
2 limited --

3 THE COURT: Maybe.

4 MR. KARWOSKI: -- before, but there's no evidence
5 that the discretion was limited until the ordinance, and
6 within --

7 THE COURT: Well, that depends on its language,
8 which is why I asked for it.

9 MR. KARWOSKI: Okay. Well, I think it is in the
10 GRS --

11 THE COURT: Is this the same ordinance that I had a
12 discussion with Mr. Mack from the UAW and Ms. Lennox from the
13 city on the other day when we were talking about the 13th
14 check issue?

15 MR. KARWOSKI: I don't think so.

16 THE COURT: Different language?

17 MR. KARWOSKI: Maybe it is. No. Maybe it is, the
18 amendment, because the amendment addresses the 13th -- says
19 that you can no longer award a 13th check or anything like
20 that, and with respect to awarding interest on ASF accounts,
21 the --

22 THE COURT: Okay.

23 MR. KARWOSKI: -- range is limited, but the --

24 THE COURT: All right. So if we have that -- if
25 that's the same ordinance, we have that, so --

1 MR. KARWOSKI: You have that. Page -- of this
2 exhibit, page 19, one of the bullet points under ASF
3 recoupment, which is the city's exhibit -- it's the GRS
4 explaining how recoupment was done -- the fourth bullet point
5 on page 16 says GRS board granted discretion to declare
6 interest credits to the ASF accounts.

7 THE COURT: Right.

8 MR. KARWOSKI: And I believe that's referencing --

9 THE COURT: So my question was what was the
10 authority of the board to do that?

11 MR. KARWOSKI: I think it's the ordinance.

12 THE COURT: Okay. We'll have a look at that. Thank
13 you, sir.

14 MR. KARWOSKI: Well, there's no evidence that the
15 trustees breached. There's no evidence that any trustee
16 breached their discretion. The city is asking the Court
17 to --

18 THE COURT: If they had it, that's possibly so, but
19 the question I'm raising here is whether they had that
20 discretion.

21 MR. KARWOSKI: Well, if they didn't have the
22 discretion, then it would have been incumbent upon the city
23 to raise that issue much earlier than 2011. The city -- it's
24 the city's ordinance that creates the program. The city
25 has --

1 THE COURT: Look, we're here in bankruptcy to fix
2 longstanding practices and policies that were not good.

3 MR. KARWOSKI: There's no evidence one way or the
4 other that the discretion was bad.

5 THE COURT: If they had it, you might be right.

6 MR. KARWOSKI: The city was aware of the awards of
7 interest, knew or should have known of the awards of interest
8 as they were being awarded over the course of years because
9 the city has four --

10 THE COURT: Mr. Mack argued to me that even if the
11 city knew of it, only the beneficiaries of the trust had
12 standing to raise the issue, and the city was not a
13 beneficiary of the trust.

14 MR. KARWOSKI: I didn't -- well, I wasn't here for
15 that argument, but the --

16 THE COURT: Oh, yeah. You did say that. Well, that
17 was his interesting argument.

18 MR. KARWOSKI: But the -- I mean the city certainly
19 could have thought of a way to raise that issue.

20 THE COURT: It did. It amended the ordinance.

21 MR. KARWOSKI: But that was in 2011. I'm talking
22 about the bulk of the recoupment period when the ordinance
23 was not worded that way.

24 THE COURT: Well, the amendment of the ordinance
25 hardly proves that the city had agreed before the ordinance

1 there was discretion under it.

2 MR. KARWOSKI: If it's in the ordinance, then --

3 THE COURT: Yeah. We'd have to --

4 MR. KARWOSKI: It's the city's ordinance.

5 THE COURT: We'd have to have a --

6 MR. KARWOSKI: It's not a matter of agreeing to it.

7 THE COURT: Let me ask you to wrap up, if you would.

8 MR. KARWOSKI: It's whatever the ordinance --

9 THE COURT: Let me ask you to wrap up, if you would,
10 sir.

11 MR. KARWOSKI: Okay. I would disagree with Mr.
12 Quinn's answer to your question about how to deal with the
13 settlement aspect, that ASF recoupment is part of the
14 settlement. My answer would be that the settlement is -- the
15 settlement is improper because it includes an illegal and
16 unjust component, which is the ASF interest component. The
17 fact that it was a settlement, it was a settlement by the
18 retirement interests in -- that were working in the
19 bankruptcy, including the Retirees' Committee, but the --
20 even though I'm a member of the committee, I suggest that
21 this was outside the scope of the jurisdiction of the
22 Retirees' Committee because as to ASF participation, as to
23 ASF recoupment, the Retirees' Committee is a committee that
24 is created to represent -- it's a creditors' committee. As
25 to ASF recoupment, I and the other ASF participants are not

1 creditors of the city. We're not -- as ASF participants --
2 I'm a creditor as a --

3 THE COURT: Okay. So if you're not creditors of the
4 city, are retirees creditors of the city? Let me rephrase
5 that. If ASF creditors are not creditors of the city, are
6 retirees with pension claims creditors of the city?

7 MR. KARWOSKI: Yes, yes. I'm a member --

8 THE COURT: Why the distinction?

9 MR. KARWOSKI: Because the ASF recoupment is of a
10 different nature. The pension is an amount that's owed to
11 retirees by the city, and Mr. Quinn had that discussion about
12 GRS, but I believe Mr. Bennett said in his opening it's a
13 joint obligation, and I would take it at that. There is an
14 obligation to --

15 THE COURT: He explained to me -- I think it was
16 him -- that ASF is a city plan adopted or implemented
17 pursuant to a city ordinance. Is that so?

18 MR. KARWOSKI: ASF?

19 THE COURT: Um-hmm.

20 MR. KARWOSKI: Yes.

21 THE COURT: So if that's so, why wouldn't the ASF
22 piece of a pensioner's claim be a claim against the city?

23 MR. KARWOSKI: Because with respect to ASF, I have
24 no -- as a pensioner who retired two and a half years ago and
25 cashed out my ASF account, I have no relationship now to the

1 city as a creditor or as a debtor with regard to ASF. The
2 only time I was a --

3 THE COURT: Whoa, whoa. Time out. Does this ASF
4 recoupment program impact you at all?

5 MR. KARWOSKI: Yes.

6 THE COURT: How's that?

7 MR. KARWOSKI: You mean me personally?

8 THE COURT: Yeah.

9 MR. KARWOSKI: Yes.

10 THE COURT: Oh, I thought you just said you cashed
11 out.

12 MR. KARWOSKI: No. It impacts me because I am
13 subject to recoupment. If the plan is approved --

14 THE COURT: You are. Okay.

15 MR. KARWOSKI: I am.

16 THE COURT: Okay.

17 MR. KARWOSKI: It would be -- it would be taken --

18 THE COURT: Because of your --

19 MR. KARWOSKI: Recoupment --

20 THE COURT: Because of your pension check.

21 MR. KARWOSKI: Because of my pension check.

22 THE COURT: Okay. Okay. Got it.

23 MR. KARWOSKI: But with respect to that ASF program,
24 the only time I was a creditor of the city was for the short
25 momentary point of time when the city withheld three, five,

1 or seven percent from my salary check and transmitted it to
2 GRS. Once that was done, I'm no longer a creditor of the
3 city with respect to ASF. And having retired two and a half
4 years ago, I'm not a creditor with respect to ASF. If you
5 separate my being an ASF participant -- and that part of the
6 settlement is qualitatively different than adjusting the debt
7 that the city owes to me as a pensioner and with regard to
8 OPEB benefits. The city is creating this purported debt out
9 of whole cloth. It's a relationship. The city is suggesting
10 that ASF participants received excess interest from the GRS
11 because of wrongdoing by the GRS trustees. That would be --
12 in an ordinary sense of things, that would be an action or a
13 claim between the GRS and ASF participants. The city has no
14 part of that, so I'm suggesting that that -- whether that's
15 true or not, that should be a separate action.

16 THE COURT: But the city pays the price for that.

17 MR. KARWOSKI: But no action -- the city pays the
18 price for it eventually, but it's asking the Court to come to
19 the conclusion now as to not only the end result but the
20 dollar amount, which is very substantial, without the city or
21 the GRS having to go through the ordinary process of
22 litigation. There was no pending claim here.

23 THE COURT: You're right. It's a settlement.

24 MR. KARWOSKI: But I'm suggesting it wasn't a proper
25 settlement because the Retirees' Committee only has authority

1 to represent creditors, and as to ASF participants --

2 THE COURT: But it can't be --

3 MR. KARWOSKI: -- I'm not a creditor.

4 THE COURT: It can't be an improper settlement
5 because they didn't start litigation.

6 MR. KARWOSKI: No, but it can be an -- I'm just
7 saying that the fact that there was no litigation shows that
8 there was no established debt or duty to make this payment
9 from ASF participants back to the GRS. The city is saying
10 that --

11 THE COURT: Well, but there's no requirement in
12 bankruptcy law that says that the plaintiff in a settlement
13 in the bankruptcy context has to show it would have won in
14 order to get the Bankruptcy Court to approve the settlement.

15 MR. KARWOSKI: But it would not be the plaintiff.
16 The city is not the plaintiff -- would not be the
17 plaintiff --

18 THE COURT: Why not?

19 MR. KARWOSKI: -- as to this claim.

20 THE COURT: You already admitted that the city pays
21 the price for whatever happened with this.

22 MR. KARWOSKI: The obvious plaintiff would be the
23 GRS, but the GRS -- which would have to say that we paid too
24 much interest, that our trustees --

25 THE COURT: And the GRS participated in this

1 settlement.

2 MR. KARWOSKI: -- did some wrongdoing. Yes, they
3 did, and I question whether that's not a conflict of interest
4 on the part of the Retirement Systems and whether that's
5 not --

6 THE COURT: Well, but, see, here --

7 MR. KARWOSKI: -- reflective of them covering --

8 THE COURT: -- I have to wonder if you're talking in
9 circles because once you say the city can't do it, only the
10 GRS can, but then the GRS did the settlement, and you say,
11 well, they can't because they have a conflict of interest.
12 Somebody has got to be able to deal with this issue. Who is
13 it?

14 MR. KARWOSKI: Well, the GRS should have brought or
15 could -- I guess it goes outside of bankruptcy -- bring a
16 lawsuit against ASF participants alleging that they --

17 THE COURT: But this is a settlement. This is a
18 settlement.

19 MR. KARWOSKI: It's a settlement.

20 THE COURT: Nothing in bankruptcy law says you have
21 to bring a lawsuit or prove your claim before you can settle
22 it. In fact, we like it when you settle them before you do
23 either one of those.

24 MR. KARWOSKI: But ASF participants as ASF
25 participants are not parties to the bankruptcy. We're not

1 creditors.

2 THE COURT: Okay. That's a different question.

3 MR. KARWOSKI: We're not creditors. There's no --

4 THE COURT: That's a different question.

5 MR. KARWOSKI: -- claim or --

6 THE COURT: All right. Again, let me ask you to
7 wrap --

8 MR. KARWOSKI: There's no controversy.

9 THE COURT: Let me ask you to wrap up.

10 MR. KARWOSKI: The city has not met procedural due
11 process requirements so as to warrant including ASF
12 recoupment in the plan of adjustment. The city has not met
13 its burden of proof to establish that the GRS trustees acted
14 wrongfully in awarding interest to ASF accounts, particularly
15 in light of the long historical parity between ASF account
16 earnings and GRS overall pension fund earnings. The method
17 used by the city to calculate alleged excess interest is
18 biased in that within the ten-year recoupment period, it does
19 not credit ASF accounts for years when market earnings
20 exceeded what was awarded to ASF accounts. Because of the
21 procedural shortcuts and the city's biased approach to ASF
22 recoupment, the plan of adjustment fails to satisfy the
23 requirement of Section 1129(a)(3) that the plan has been
24 proposed in good faith and not by any means forbidden by law.
25 Thank you, your Honor.

1 THE COURT: Thank you, sir. Sir.

2 MR. BENNETT: Do you have any questions of the city?

3 THE COURT: Just some housekeeping matters, nothing
4 of substance. Thank you. One second here. Bring it up on
5 my screen. Okay. Earlier we talked about getting us either
6 a paper or an electronic version of the exhibits. I guess on
7 reflection my preference would be to get an electronic
8 version if that's easier for you. If it's easier to do the
9 paper, that's fine, but --

10 MR. BENNETT: We were planning both.

11 THE COURT: Well, then let's just stick with the
12 electronic version. Okay?

13 MR. BENNETT: Okay.

14 THE COURT: And will that include the exhibit -- the
15 admitted exhibits of all the parties or just the city? All
16 the parties?

17 MR. BENNETT: All the parties.

18 THE COURT: Okay. That would be our preference as
19 well. I intend to give a summary of a decision in court on
20 the record here on Friday, November 7th, at 2 p.m. And
21 actually it may or may not be this courtroom. We'll have to
22 make an announcement as to which courtroom it will be. And
23 that's all I have. Anybody else have anything further? Yes.
24 Mr. Gordon wanted a chance one more time. Are you going to
25 remind me that I still have under advisement the issues

1 regarding the admissibility of portions of Ms. Kopacz's
2 report?

3 MR. GORDON: No, your Honor. I figure you're aware
4 of that. I will not remind you of that. Thank you. But if
5 you'd like me to, I will, but -- no. Quickly --

6 THE COURT: Not necessary.

7 MR. GORDON: Quickly, based upon the lateness of the
8 time, I wanted to ask the Court for some guidance. A version
9 of the confirmation order has been circulated. It's about
10 142 pages long, I believe. Parties need to review that.
11 But, in particular, what's happening with the Retirement
12 Systems is the Retirement Systems has spent a tremendous
13 amount of time working on plan implementation, specifically
14 working on the hybrid plan and change of the payroll and
15 things of that nature. There are other things under the plan
16 that are going to fall upon the Retirement Systems to
17 implement as well that are triggered by the effective date of
18 the plan.

19 THE COURT: Um-hmm.

20 MR. GORDON: Now, at one time it was thought that
21 that effective date may be as far out -- I believe the
22 contribution agreement -- state contribution agreement even
23 envisioned it could go out as far as April. Now we're
24 hearing that it's going to be -- recently we've been informed
25 that it's going to be sooner rather than later. As a result,

1 there are a number of timelines that need to be established
2 that may -- or let's put it this way -- some timelines that
3 may already be envisioned under the plan need to be modified
4 to allow logistically for the Retirement Systems to implement
5 all these different initiatives. They have to deal with
6 changes in payroll. They have to deal with getting notices
7 out for lump sum recoupment.

8 THE COURT: Why are you telling me all of this?

9 MR. GORDON: I'm telling you all this because, you
10 know, there's no great methodology under the bankruptcy rules
11 for -- it seems to me that a lot of this needs -- would be
12 well suited to be folded into the confirmation order, but
13 there's really no process for -- at least normally and
14 certainly not right now for discussing with the Court where
15 we are in the process of the confirmation order, and I didn't
16 know how you have envisioned that dovetailing with when you
17 make your ruling this could be something --

18 THE COURT: Okay. That's a fair enough question.
19 It is my intent to -- assuming the plan is confirmed, to hold
20 a hearing on the form of the confirmation order and to
21 discuss with all parties how the implementation of the plan
22 will roll out to the point of an effective date. So can I
23 suggest that you hold that discussion? Well, let me not
24 suggest that. Let me suggest that you discuss your issues
25 with city counsel, the city attorneys, Jones Day, and then

1 we'll discuss that question and all the other implementation
2 scheduling questions on that day when we have a hearing on
3 the form of the order. I don't know now whether that will be
4 the Monday or the Wednesday following November 7th. Tuesday,
5 of course, is a federal holiday, but we'll figure out that
6 scheduling after the opinion is given and assuming the plan
7 is confirmed. A lot will depend on how far along you all are
8 in agreeing upon the form of the order by then. I'd like to
9 get the order entered, assuming that the plan is confirmed,
10 as soon as possible after the decision is announced.

11 MR. GORDON: Understood. And the parties have been
12 consultation --

13 THE COURT: Good.

14 MR. GORDON: -- both the city's professionals and
15 the Retirement Systems' professionals, on all these issues,
16 so they will continue to work towards that.

17 THE COURT: All right. Anything further, anybody?
18 We're in recess until November 7th.

19 THE CLERK: All rise.

20 (Proceedings concluded at 5:33 p.m.)

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WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

November 3, 2014

Lois Garrett